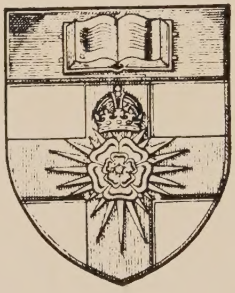
UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

346.4
Mx. North



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1892_2

1892.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

REPORTERS.

Court of Appeal	H. CADMAN JONES, MARTIN WARE, W. WORSLEY KNOX, G. I. FOSTER COOKE,	*Barristers-at-Law.*
Mr. Justice Chitty	GEORGE MURRAY, W. COWELL DAVIES,	*Barristers-at-Law.*
Mr. Justice North	W. LLOYD CABELL, D. PITCAIRN,	*Barristers-at-Law.*
Mr. Justice Stirling	W. WORSLEY KNOX, G. A. STREETEN,	*Barristers-at-Law.*
Mr. Justice Kekewich	G. I. FOSTER COOKE, C. C. M. DALE,	*Barristers-at-Law.*
Mr. Justice Romer	H. L. FRASER, FRANK EVANS,	*Barristers-at-Law.*
Mr. Justice Vaughan Williams (COMPANY CASES)	FRANK EVANS,	*Barrister-at-Law.*

1892.—VOL. II.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

BIBL. LONDIN UNIV.

Lord Halsbury,	*Lord Chancellor.*
Lord Herschell,	*ex-Lord Chancellor.*
Lord Esher,	*Master of the Rolls.*
Sir Nathaniel Lindley,	*Lords Justices of the Court of Appeal.*
Sir C. S. C. Bowen,	
Sir Edward Fry,	
Sir Henry C. Lopes,	
Sir E. E. Kay,	
Sir A. L. Smith,	
Sir J. W. Chitty,	*Justices of High Court, attached to Chancery Division.*
Sir Ford North,	
Sir James Stirling,	
Sir Arthur Kekewich,	
Sir Robert Romer,	
Sir Roland Vaughan Williams	*Attached to Chancery Division for Company Cases.*
Sir Richard E. Webster,	*Attorney-General.*
Sir Edward Clarke,	*Solicitor-General.*

ERRATA.

Page	*Line*	*For*	*Read*
63	foot-note (2)	36 Ch. D. 33	36 Ch. D. 133
113	1	*Methold*	*P. S. Gregory*
282	2	*Morton Smith*	*Horton Smith*, Q.C.

UNIVERSITY OF LONDON,
Burlington Gardens, W.

The Mode of Citation of the Volumes in the LAW REPORTS, commencing January 1, 1892, will be as follows:—

In the First Series,
[1892] 1 Ch. [1892] 2 Ch. [1892] 3 Ch.

In the Second Series,
[1892] 1 Q. B. [1892] 2 Q. B. [1892] P.

In the Third Series,
[1892] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

	PAGE
A.	
Abingdon, Baring *v.* – (C.A.)	374
Anglo-Austrian Printing and Publishing Union, *In re.* Isaacs' Case – – (C.A.)	158
Aylesford (Earl of) *v.* Poulett (Earl) – – – –	60
B.	
Banks *v.* Heaven. *In re* Burton's Will – – – – –	38
Baring *v.* Abingdon – (C.A.)	374
Barker, *In re.* Buxton *v.* Campbell – – – – – –	491
Barney, *In re.* Barney *v.* Barney	265
——— *v.* Barney. *In re* Barney	265
Bolton *v.* Natal Land and Colonization Company – – –	124
Borough of Portsmouth (Kingston, Fratton and Southsea) Tramways Company, *In re* –	362
Bowen, *In re.* James *v.* James	291
Brewer *v.* Square – – –	111
British Bank of South America, Lubbock *v.* – – – –	198
Burrows, Reid *v.* – – –	413
Burton's Will, *In re.* Banks *v.* Heaven – – – –	38
Bute's (Marquis of) Case. *In re* Cardiff Savings Bank – –	100
Buxton *v.* Campbell. *In re* Barker – – – –	491
Byng's Settled Estates, *In re* –	219
C.	
Campbell, Buxton *v.* *In re* Barker – – – –	491
Cardiff Savings Bank, *In re.* Bute's (Marquis of) Case –	100
Carter *v.* Hasluck. Carter *v.* Silber – – – (C.A.)	278

PAGE

Carter *v.* Silber. Carter *v.* Hasluck – – – (C.A.) 278
Chawners' Settled Estates, *In re* 192
Cliff's Trusts, *In re* – – – 229
Cobley, Meux *v.* – – – 253

D.

Delobbel-Flipo, Morris *v.* – – 352

E.

Eddystone Marine Insurance Company, *In re*. *Ex parte* Western Insurance Company 423
Edge, Johnson *v.* – (C.A.) 1
Elkington & Co. *v.* Hürter – 452
Evans *v.* Evans – – (C.A.) 173
——, London and North Western Railway Company *v.* 432

F.

Flegg *v.* Prentis – – – 428
Fraser, Henthorn *v.* – (C.A.) 27

G.

Gardner, Knight *v.* *In re* Knight 368
Gray and New Land Development Association, *In re* (C.A.) 138
Greenwood, *In re*. Greenwood *v.* Greenwood – – – 295
——— *v.* Greenwood. *In re* Greenwood – – – 295
Gridley, Laybourn *v.* – – 53

H.

Hasluck, Carter *v.* Carter *v.* Silber – – – (C.A.) 278
Heaven, Banks *v.* *In re* Burton's Will – – – – 38
Henry Lister & Co., Limited, *In re*. *Ex parte* Huddersfield Banking Company – – 417
Henthorn *v.* Fraser – (C.A.) 27
Hitchcock *v.* Stretton – – 343
Hope *v.* Hope – – – 336
Hopkinson's (J. & J.) Trademarks, *In re* – – – 116
Howard's Settled Estates, *In re* 233

PAGE

Huddersfield Banking Company, *Ex parte*. *In re* Henry Lister & Co., Limited – – – 417
Hürter, Elkington & Co. *v.* – 452

I.

Isaacs' Case. *In re* Anglo-Austrian Printing and Publishing Union – – (C.A.) 158

J.

James *v.* James. *In re* Bowen – 291
Johnson *v.* Edge – – (C.A.) 1

K.

Kemeys-Tynte, *In re*. Kemeys-Tynte *v.* Kemeys-Tynte – 211
——— *v.* Kemeys-Tynte. *In re* Kemeys-Tynte – – 211
Kensington and Knightsbridge Electric Lighting Company, Lane Fox *v.* – – – 66
King & Co.'s Trade-mark, *In re* (C.A.) 462
Knight, *In re*. Knight *v.* Gardner – – – – – 368
——— *v.* Gardner. *In re* Knight 368

L.

Lane Fox *v.* Kensington and Knightsbridge Electric Lighting Company – – – 66
Laybourn *v.* Gridley – – 53
Lock *v.* Pearce – – – 328
London and North Western Railway Company *v.* Evans – 432
Lubbock *v.* British Bank of South America – – – 198

M.

McGrath (Infants), *In re* – 496
Mercantile Bank of Australia, *In re* – – – – – 204
Mercantile Investment and General Trust Company *v.* River Plate Trust, Loan and Agency Company – – 303

PAGE

Merryweather *v.* Moore – – 518
Meux *v.* Cobley – – – 253
Michell, *In re.* Moore *v.* Moore 87
Moore, Merryweather *v.* – – 518
——— *v.* Moore. *In re* Michell– 87
Morris *v.* Delobbel-Flipo – – 352
——— *v.* Tottenham and Forest Gate Railway Company – 47

N.

Natal Land and Colonization Company, Bolton *v.* – – 124
National Wholemeal Bread and Biscuit Company, *In re* – 457
New Land Development Association and Gray, *In re* (C.A.) 138

O.

Ormrod's Settled Estate, *In re* – 318

P.

Pearce, Lock *v.* – – – 328
Perls *v.* Saalfeld – – (C.A.) 149
Poulett (Earl), Aylesford (Earl of) *v.* – – – – – 60
Prentis, Flegg *v.* – – – 428

R.

Reid *v.* Burrows – – – 413
Reynolds, Rosenthal *v.* – – 301
Rice, Rogers *v.* – (C.A.) 170

PAGE

River Plate Trust, Loan and Agency Company, Mercantile Investment and General Trust Company *v.* – – – 303
Robertson, Sanderson & Co.'s Application, *In re* – – 245
Rogers *v.* Rice – (C.A.) 170
———, Steers *v.* – (C.A.) 13
Rosenthal *v.* Reynolds – – 301

S.

Saalfeld, Perls *v.* – (C.A.) 149
St. Mary Abbotts, Kensington (Vestry of), Worley *v.* – – 404
Silber, Carter *v.* Carter *v.* Hasluck – – – (C.A.) 278
Square, Brewer *v.* – – – 111
Steers *v.* Rogers – (C.A.) 13
Stretton, Hitchcock *v.* – – 343

T.

Thomas, Young *v.* – (C.A.) 134
Tottenham and Forest Gate Railway Company, Morris *v.* 47

W.

Western Insurance Company, *Ex parte. In re* Eddystone Marine Insurance Company – 423
Worley *v.* St. Mary Abbotts, Kensington (Vestry of) – 404

Y.

Young *v.* Thomas – (C.A.) 134

TABLE OF CASES CITED.

A.

		PAGE
Abercorn's (Marquis of) Case	4 D. F. & J. 78	105
Abernethy *v.* Hutchinson	3 L. J. (O.S.) (Ch.) 209; 1 H. & T. 28	520
Acey *v.* Simpson	5 Beav. 35	297
Adams *v.* Lindsell	1 B. & Al. 681	28
Agar-Ellis, In re	24 Ch. D. 317	503
Ainsworth *v.* Walmsley	Law Rep. 1 Eq. 518	119
Andrews *v.* Salt	Law Rep. 8 Ch. 622	504
Anglo-American Brush Electric Light Corporation *v.* King	[1892] A. C. 367	77
Arbenz' Application, In re	35 Ch. D. 248	247
Archer's Case	1 Rep. 66 b	176
Armstrong, In re	[1892] 1 Q. B. 327	63
Arundell *v.* Falmouth (Viscount)	2 M. & S. 440	386
Ashworth, Ex parte	Law Rep. 18 Eq. 705	419
Attorney-General *v.* Leicester (Corporation of)	7 Beav. 176	270
Auckland (Lord) *v.* Westminster District Board of Works	Law Rep. 7 Ch. 597	404
Austin *v.* Austin	4 D. J. & S. 716	505
Avery *v.* Langford	Kay, 663	151
Aylesford's (Earl of) Settled Estates, In re	32 Ch. D. 162	321

B.

Bagshaw, Ex parte	13 Ch. D. 304	419
——— *v.* Spencer	2 Atk. 577	176
Bailey *v.* Roberton	3 App. Cas. 1055	76
Baines *v.* Geary	35 Ch. D. 154	151
Barber's Settled Estates, In re	18 Ch. D. 624	93
Barlow *v.* Kensington Vestry	27 Ch. D. 362; 11 App. Cas. 257	406, 407
——— *v.* Rhodes	1 C. & M. 439	386
Barnardo *v.* McHugh	[1891] A. C. 388	504
Barnes *v.* Addy	Law Rep. 9 Ch. 244	270
Barret *v.* Barret	Hetley, 35	258
Barton-upon-Humber and District Water Company, In re	42 Ch. D. 585	364
Bayley *v.* Great Western Railway Company	26 Ch. D. 434	385
Benfieldside Local Board *v.* Consett Iron Company	3 Ex. D. 54	432
Bennet *v.* Davis	2 P. Wms. 316	337
Bernal *v.* Bernal	3 My. & Cr. 559	230
Billing *v.* Coppock	1 Ex. 14	415

		PAGE
Blower *v.* Morret	2 Ves. Sen. 420	297
Blyth *v.* Fladgate	[1891] 1 Ch. 337	271
Bodenham *v.* Hoskyns	2 D. M. & G. 903	271
Bolland, Ex parte	9 Ch. D. 312	147
Bonnett *v.* Sadler	14 Ves. 526	256
Bony *v.* Taylor	2 Roll. Abr. 253, pl. 3	183
Bowen *v.* Lewis	9 App. Cas. 890	186
Bowes *v.* Strathmore	8 Jur. 92	322
Bradshaw *v.* Eyre	Cro. Eliz. 570	380
Brandon *v.* Aston	2 Y. & C. Ch. 24	41
Brentford and Isleworth Tramways Company, In re	26 Ch. D. 527	364
Brett's Case	25 Ch. D. 283	162
Bright *v.* North	2 Ph. 216	322
British and American Telegraph Company *v.* Colson	Law Rep. 6 Ex. 108	35
Brogden *v.* Metropolitan Railway Company	2 App. Cas. 666	29
Brown *v.* Collins	25 Ch. D. 56	505
Brown's Case	Law Rep. 9 Ch. 102	162
Browne *v.* La Trinidad	37 Ch. D. 1	166
Brydges *v.* Kilburne	5 Ves. 689, n.	256
Bullen-Smith, Re	57 L. T. (N.S.) 924	476
Burgess *v.* Burgess	3 D. M. & G. 896	118
Burridge *v.* Bradyl	1 P. Wms. 127	297
Busfield, In re	32 Ch. D. 123	476
Byrne *v.* Van Tienhoven	5 C. P. D. 344	29

C.

Caird *v.* Sime	12 App. Cas. 326	520
Caledonian Railway Company *v.* Sprot	2 Macq. 449	437
Campbell *v.* Wardlaw	8 App. Cas. 641	214
Carter's Case	31 Ch. D. 496	106
Challender *v.* Royle	36 Ch. D. 425	2
Chamberlayne *v.* Chamberlayne	6 E. & B. 625	182
Chambers *v.* Taylor	2 My. & Cr. 376	181
Charlemont (Earl of) *v.* Spencer	11 L. R. Ir. 347, 490	293
Chesman *v.* Nainby	2 Ld. Raym. 1456	151
Clarke, In re	21 Ch. D. 817	503
Clements *v.* Lambert	1 Taunt. 205	380
Close, Ex parte	14 Q. B. D. 386	353
Codrington *v.* Lindsay	Law Rep. 8 Ch. 578; 7 H. L. 854	281
Cohen *v.* Mitchell	25 Q. B. D. 262	138
Collen *v.* Wright	8 E. & B. 647	454
Colley *v.* Hart	44 Ch. D. 179	5
Commercial Bank of South Australia, In re	33 Ch. D. 174	207
Commissioners of Sewers *v.* Glasse	Law Rep. 19 Eq. 134	384
Congreve *v.* Evetts	10 Ex. 298	359
Consett Waterworks Company *v.* Ritson	22 Q. B. D. 318, 702	442
Cooper *v.* Macdonald	7 Ch. D. 288	337
——— *v.* Whittingham	15 Ch. D. 501	135
Corbett *v.* Hill	Law Rep. 9 Eq. 671	56
Cormack *v.* Beisly	3 De G. & J. 157	368
Cowlam *v.* Slack	15 East, 108	379
Cowley (Earl) *v.* Wellesley	35 Beav. 638	216

		PAGE
Cranstown (Lord) *v.* Johnston	3 Ves. 170	311
Cunningham & Co., In re	28 Ch. D. 682	353
Cuno, In re	43 Ch. D. 12	292
Currie's Case	3 D. J. & S. 367	165

D.

Daly *v.* Beckett	24 Beav. 114	215
Dand *v.* Kingscote	6 M. & W. 174	49
Darcy (Lord) *v.* Askwith	Hob. 234	256
Davenhill *v.* Fletcher	Amb. 244	298
Davies *v.* Wright	32 Ch. D. 220	111
Davies' Case	45 Ch. D. 537	101
Davis, In re	[1891] 3 Ch. 119	494
Davison *v.* Gent	1 H. & N. 744	381
De Beauvoir *v.* De Beauvoir	3 H. L. C. 524	175
De La Warr's (Earl) Estates	16 Ch. D. 587	321
Denham & Co., In re	25 Ch. D. 752	108
Dent *v.* London Tramways Company	16 Ch. D. 344	129
De Pereda *v.* De Mancha	19 Ch. D. 451	505
Dewhurst, Ex parte	Law Rep. 7 Ch. 185	141
Dickin *v.* Hamer	1 Dr. & Sm. 284	214
Dickinson *v.* Dodds	2 Ch. D. 463	29
Dickson, In re	29 Ch. D. 331	40
Doherty *v.* Allman	3 App. Cas. 709	258
Doidge *v.* Carpenter	6 M. & S. 47	374
Drayton *v.* Dale	2 B. & C. 293	141
Dublin and Wicklow Railway Company *v.* Black	8 Ex. 181	281
Dudley (Corporation of), In re	8 Q. B. D. 86	440
Dudley Canal Navigation Company *v.* Grazebrook	1 B. & Ad. 59	440
Dumble, In re	23 Ch. D. 360	44
Duncan *v.* Dixon	44 Ch. D. 211	281
Dunlop *v.* Higgins	1 H. L. C. 381	28

E.

East *v.* Twyford	4 H. L. C. 517	176
Ebbett's Case	Law Rep. 5 Ch. 302	281
Edwards *v.* Edwards	2 Ch. D. 291	354
Egmont's (Lord) Settled Estates, In re	45 Ch. D. 395	237
Eley *v.* Positive Government Security Life Assurance Company	1 Ex. D. 20, 88	160, 166
Elias *v.* Snowdon Slate Quarries Company	4 App. Cas. 454	214
Elliot *v.* North Eastern Railway Company	10 H. L. C. 333	437
Ewart *v.* Cochrane	4 Macq. 117	386
Exmouth Docks Company, In re	Law Rep. 17 Eq. 181	362

F.

Faithfull *v.* Ewen	7 Ch. D. 495	373
Fenwick *v.* East London Railway Company	Law Rep. 20 Eq. 544	48
Firbank's Executors *v.* Humphreys	18 Q. B. D. 54	452
Flack *v.* Longmate	8 Beav. 420	94

		PAGE
Fletcher *v.* Great Western Railway Company	4 H. & N. 242	443
Forest of Dean Coal Mining Company, In re	10 Ch. D. 450	108
Frames *v.* Bultfontein Mining Company	[1891] 1 Ch. 140	200
Fuggle *v.* Bland	11 Q. B. D. 711	429
Fuller *v.* Chamier	Law Rep. 2 Eq. 682	175
Furneaux *v.* Rucker	W. N. (1879) 135	38
Fynn, In re	2 De G. & Sm. 457	505

G.

Gardner *v.* London, Chatham, and Dover Railway Company	Law Rep. 2 Ch. 201	366
Genery *v.* Fitzgerald	Jac. 468	38
Gent, In re	40 Ch. D. 190	63
Gilbert, In re	28 Ch. D. 549	135
Goodtitle *v.* Herring	1 East, 264	176
Great Western Railway Company *v.* Bennett	Law Rep. 2 H. L. 27	441
Greaves *v.* Simpson	10 Jur. (N.S.) 609	181
Greenfield *v.* Hanson	2 Times L. R. 876	330
Grigg *v.* National Guardian Assurance Company	[1891] 3 Ch. 206	354

H.

Hall & Barker, In re	9 Ch. D. 538	345
—— *v.* Byron	4 Ch. D. 667	379
Harcourt *v.* Seymour	2 Sim. (N.S.) 12	95
Harris *v.* Scaramanga	Law Rep. 7 C. P. 481	427
Harris's Case	Law Rep. 7 Ch. 587	28
Harrison, McGregor & Co.'s Trade-marks, In re	42 Ch. D. 691	471
Harrow School (Governors of) *v.* Alderton	2 Bos. & P. 86	257
Hawksworth *v.* Hawksworth	Law Rep. 6 Ch. 539	503
Heath *v.* Dendy	1 Russ. 543	297
Hemming, Ex parte	28 L. T. 144	345
Herbert *v.* Sayer	5 Q. B. 965	140
Heritage, In re	3 Q. B. D. 726	346
Herne Bay Waterworks Company, In re	10 Ch. D. 42	362
Hewitt's Case	25 Ch. D. 283	160
Hickson *v.* Darlow	23 Ch. D. 690	113
Hill *v.* Grange	Plowd. 164	385
—— *v.* Hill	31 L. J. (Ch.) 505	504
—— *v.* Kirkwood	28 W. R. 358	113
Hodgeson *v.* Bussey	2 Atk. 89	176
Hollis *v.* Goldfinch	1 B. & C. 205	438
Holloway *v.* Holloway	5 Ves. 399	175
Holmes *v.* Blogg	8 Taunt. 35	281
Holroyd *v.* Marshall	10 H. L. C. 191	354
Holthausen, Ex parte	Law Rep. 9 Ch. 722	311
Hope *v.* Hayley	5 E. & B. 830	359
Hotchkin's Settled Estates, In re	35 Ch. D. 41	239
Hough *v.* Edwards	1 H. & N. 171	373
Household Fire and Carriage Accident Insurance Company *v.* Grant	4 Ex. D. 216	29
Hubbard, Ex parte	17 Q. B. D. 690	352

		PAGE
Hudson's Trade-marks, In re	32 Ch. D. 311	119
Hughes *v.* Little	18 Q. B. D. 32	354
Hulme *v.* Tenant	1 Bro. C. C. 16	293

I.

Imperial Marine Insurance Company *v.* Fire Insurance Corporation	4 C. P. D. 116	426
Inchiquin (Lord), Ex parte	[1891] 3 Ch. 28	160

J.

Jackson *v.* Cator	5 Ves. 688	256
Jacques *v.* Harrison	12 Q. B. D. 136, 165	330
James, Ex parte	Law Rep. 9 Ch. 609	419
Jeffery, In re	[1891] 1 Ch. 675	38
Jesson *v.* Wright	2 Bli. 1	182
Johnson *v.* Fesemeyer	3 De G. & J. 13	345
Jones *v.* Chappell	Law Rep. 20 Eq. 539	258
——— *v.* Morgan	1 Bro. C. C. 205	183
——— *v.* Roberts	8 Sim. 397	414
Jordan *v.* Adams	29 L. J. (C.P.) 180	176

K.

Karuth's Case	Law Rep. 20 Eq. 506	161
Kay *v.* Oxley	Law Rep. 10 Q. B. 360	390
Kinahan *v.* Bolton	15 Ir. Ch. Rep. 75	302
——— *v.* Kinahan	45 Ch. D. 78	464
King, In re	2 Morrell, 119	419
——— *v.* Melling	1 Vent. 214	189
Knatchbull's Settled Estate, In re	27 Ch. D. 349; 29 Ch. D. 588	237, 323
Knowles, In re	52 L. J. (Ch.) 685	64
Knowles & Sons *v.* Lancashire and Yorkshire Railway Company	14 App. Cas. 248	440
Kurtz *v.* Spence	36 Ch. D. 770	7

L.

La Compagnie Générale d'Eaux Minérales et de Bains de Mer, In re	[1891] 3 Ch. 451	463
L'Fit *v.* L'Batt	1 P. Wms. 526	229
Lake *v.* Argyll (Duke of)	6 Q. B. 477	104
Lambert's Estate, In re	39 Ch. D. 626	337
Lampleigh *v.* Brathwait	Sm. L. C. 9th Ed. Vol. i. p. 153	194
Land Credit Company of Ireland *v.* Fermoy (Lord)	Law Rep. 5 Ch. 763	106
Leather Cloth Company *v.* American Leather Cloth Company	11 H. L. C. 523	119
Lee *v.* Neuchatel Asphalte Company	41 Ch. D. 1	124, 200
—— *v.* Sankey	Law Rep. 15 Eq. 204	269
Leigh's Estate, In re	Law Rep. 6 Ch. 887	322
Leonard and Ellis's Trade-mark, In re	26 Ch. D. 288	118
Levasseur *v.* Mason & Barry	[1891] 2 Q. B. 73	429
Lingen *v.* Sowray	1 P. Wms. 172	95
Litchfield *v.* Jones	36 Ch. D. 530	414

		PAGE
London (City of) *v.* Greyme	Cro. Jac. 182	257
London (Corporation of) *v.* Riggs	13 Ch. D. 798	257
London and North Western Railway Company *v.* Ackroyd	31 L. J. (Ch.) 588	438
London and South Western Railway Company *v.* Gomm	20 Ch. D. 562	310
Long Wellesley's Case	2 Russ. & My. 639	63
Low *v.* Bouverie	[1891] 3 Ch. 82	455
—— *v.* Burron	3 P. Wms. 262	92
Lumsden's Case	Law Rep. 4 Ch. 31	281
Lyons *v.* Blenkin	Jac. 245	508

M.

McAndrew v. Bassett	4 D. J. & S. 380	119
Macleod *v.* Jones	24 Ch. D. 289	113
Mahony *v.* East Holyford Mining Company	Law Rep. 7 H. L. 869	105
Marsden *v.* Meadows	7 Q. B. D. 80	354
Marsham *v.* Hunter	Cro. Jac. 253; Yelverton's Rep. 189	380, 383
Martin *v.* Martin	2 Russ. & My. 507	310
Mathers *v.* Green	Law Rep. 1 Ch. 29	16
Matheson Brothers, In re	27 Ch. D. 225	207
Medlock, In re	55 L. J. (Ch.) 738	41
Meek *v.* Devenish	6 Ch. D. 566	95
Mercer *v.* Graves	Law Rep. 7 Q. B. 499	373
Metropolitan Board of Works *v.* Metropolitan Railway Company	Law Rep. 3 C. P. 612; 4 C. P. 192	439
Meux *v.* Smith	11 Sim. 410	147
Miller's Case	3 Ch. D. 661	105, 161
Mills *v.* Charlesworth	25 Q. B. D. 421	354
—— *v.* Dunham	[1891] 1 Ch. 576	151
—— *v.* Norris	5 Ves. 335	41
—— *v.* Seward	1 J. & H. 733	183
Moët's Trade-mark, In re	7 Rep. Pat. Cas. 226	247
Moore *v.* Webster	Law Rep. 3 Eq. 267	338
Morgan *v.* Morgan	5 Madd. 408	338
—— *v.* Stephens	3 Giff. 226	270
Morison *v.* Moat	9 Hare, 241	519
Mumford *v.* Gething	7 C. B. (N.S.) 305	151
Mundy's Settled Estates, In re	[1891] 1 Ch. 399	219
Musgrave *v.* Inclosure Commissioners	Law Rep. 9 Q. B. 162	386
Myler *v.* Fitzpatrick	6 Madd. 360	270

N.

Neate *v.* Marlborough (Duke of)	3 My. & Cr. 407	430
Nevin, In re	[1891] 2 Ch. 299	504
Newall & Elliot, In re	4 C. B. (N.S.) 269	75
Newbery, In re	Law Rep. 1 Ch. 263	503
Newlove *v.* Shrewsbury	21 Q. B. D. 41	354
Nicholls *v.* Stretton	7 Beav. 42	151
Nickells *v.* Atherstone	10 Q. B. 944	387
Norris *v.* Chambres	29 Beav. 246; 3 D. F. & J. 583	310
North *v.* Stewart	15 App. Cas. 452	368
North London Land Company *v.* Jacques	32 W. R. 283	170, 330
Northen *v.* Carnegie	4 Drew. 587	92

		PAGE
Norton *v.* Florence Land and Public Works Company	7 Ch. D. 332	310
Nuttall *v.* Hargreaves	[1892] 1 Ch. 23	77

O.

Onslow's Case	3 Times L. R. 42, 551	160
Ostle *v.* Christian	T. & R. 324	414
Oxford Benefit Building and Investment Society, In re	35 Ch. D. 502	129

P.

Paget *v.* Ede	Law Rep. 18 Eq. 118	311
Palethorpe, In re	Law Rep. 20 Eq. 273	419
Pannell *v.* Hurley	2 Coll. 241	271
Parry & Daggs, In re	31 Ch. D. 130	187
Parsons, Ex parte	16 Q. B. D. 532	353
Penn *v.* Baltimore (Lord)	1 Ves. Sen. 444	310
—— *v.* Bibby	Law Rep. 2 Ch. 127	75
Perrin *v.* Blake	4 Burr. 2579	188
Pickard *v.* Sears	6 A. & E. 469	140
Pollard, Ex parte	Mont. & Ch. 239	311
——— *v.* Photographic Company	40 Ch. D. 345	522
Prettyman's Case	Cited 2 Vern. 279	315
Price, In re	28 Ch. D. 709	292
Prince Albert *v.* Strange	1 Mac. & G. 25	519
Proctor *v.* Bennis	36 Ch. D. 740	7
Pugh *v.* Golden Valley Railway Company	12 Ch. D. 274; 15 Ch. D. 330	48
Purser *v.* Worthing (Local Board of Health for)	18 Q. B. D. 818	257

Q.

Quilter *v.* Mapleson	9 Q. B. D. 672	171, 238, 330

R.

Rackham *v.* Siddall	1 Mac. & G. 607	105
Ralston *v.* Smith	11 H. L. C. 223	75
Ramskill *v.* Edwards	31 Ch. D. 100	271
Rangeley *v.* Midland Railway Company	Law Rep. 3 Ch. 306	49
Reeves *v.* Barlow	12 Q. B. D. 436	352
Reg. *v.* Barnardo	24 Q. B. D. 283	504
Reuter's Telegram Company *v.* Byron	43 L. J. (Ch.) 661	520
Richards *v.* Bergavenny (Lady)	2 Vern. 324	175
——— *v.* Butcher	[1891] 2 Ch. 522	118
Richardson *v.* Harrison	16 Q. B. D. 85	185
Robertson *v.* Hartopp	43 Ch. D. 484	375
——— *v.* Robertson	6 P. D. 119	137
Robinson *v.* Macdonnell	5 M. & S. 228	358
Rochford *v.* Hackman	9 Hare, 475	41
Roderick *v.* Aston Local Board	5 Ch. D. 328	439
Roper *v.* Roper	3 Ch. D. 714	295
Rowe, In re	58 L. J. (Ch.) 703	494

		PAGE
S.		
Sacheverell *v.* Porter	W. Jones, 396	379
Saundeys *v.* Oliff	Moor. 467	387
Scanlan, In re	40 Ch. D. 200	503
Schofield, Ex parte	12 Ch. D. 337	419
Scott *v.* Scarborough (Earl of)	1 Beav. 154	41
Shackell, Ex parte	2 D. M. & G. 842	345
Shaw *v.* Neale	6 H. L. C. 581	372
Shelley's Case	1 Rep. 93 b.	173
Shephard, In re	43 Ch. D. 131	430
Shepherd *v.* Ingram	Amb. 448	41
Simmonds, Ex parte	16 Q. B. D. 308	419
Simmons *v.* Norton	7 Bing. 640	257
Simpson *v.* South Staffordshire Waterworks Company	4 D. J. & S. 679	48
Sisson *v.* Giles	3 D. J. & S. 614	95
Skeggs' Settlement, In re	2 D. J. & S. 533	95
Skinners' Company *v.* Knight	[1891] 2 Q. B. 542	330
Slim *v.* Croucher	1 D. F. & J. 518	455
Smith, In re	42 Ch. D. 302	494
—— *v.* Buchan	36 W. R. 631	135
—— *v.* Dimes	4 Ex. 32	414
—— *v.* Lucas	18 Ch. D. 531	281
—— *v.* Widlake	3 C. P. D. 10	315
Spackman *v.* Plumstead District Board of Works	10 App. Cas. 229	406
Spence, In re	2 Ph. 247	505
Stamford's (Lord) Settled Estates, In re	43 Ch. D. 84	223
Stannard *v.* St. Giles, Camberwell (Vestry of)	20 Ch. D. 190	406
Stedman *v.* Collett	17 Beav. 608	345
Stevenson *v.* Anderson	2 V. & B. 407	484
——— *v.* McLean	5 Q. B. D. 346	29
Stogdon, In re	56 L. J. (Ch.) 420	343
Stoner *v.* Todd	4 Ch. D. 58	75
Storer *v.* Johnson	15 App. Cas. 203	414
Stoughton *v.* Leigh	1 Taunt. 402	214
Stourton *v.* Stourton	8 D. M. & G. 760	504
Street, In re	Law Rep. 10 Eq. 165	345
Sudeley's (Lord) Settled Estates, In re	37 Ch. D. 123	237
Swabey *v.* Port Darwin Gold Mining Company	1 Megone, 385	165
T.		
Thackwray and Young's Contract, In re	40 Ch. D. 34	141
Thomas *v.* Cross	2 Dr. & Sm. 423	429
——— *v.* Owen	20 Q. B. D. 225	380
Thomson *v.* Eastwood	2 App. Cas. 215	494
Tipping *v.* Clarke	2 Hare, 383	519
Tuck & Sons *v.* Priester	19 Q. B. D. 629	520
Turner *v.* Marriott	Law Rep. 3 Eq. 744	141
Turton *v.* Turton	42 Ch. D. 128	118
Twyford Abbey Settled Estates, In re	30 W. R. 268	323
Tyrringham's Case	4 Rep. 36 b.	383
U.		
Ungar *v.* Sugg	8 Rep. Pat. Cas. 385	5
Unionist Club, In re	W. N. (1891) 64	207

		PAGE
United Telephone Company *v.* Harrison, Cox-Walker & Co.	21 Ch. D. 720	77
Uzielli *v.* Boston Marine Insurance Company	15 Q. B. D. 11	426

V.

Van Duzer's Trade-mark, In re	34 Ch. D. 623	118

W.

Wadsworth, In re	34 Ch. D. 155	368
Ward *v.* Eyre	15 Ch. D. 130	414
—— *v.* Sharp	53 L. J. (Ch.) 313	345
Waterhouse *v.* Stansfield	9 Hare, 234	310
Watkins *v.* Scottish Imperial Insurance Company	23 Q. B. D. 285	471
Waugh *v.* Carver	2 H. Bl. 235	104
Westhead *v.* Riley	25 Ch. D. 413	429
Whalley *v.* Tompson	1 Bos. & P. 371	389
Wheal Buller Consols, In re	38 Ch. D. 42	160
Whitaker *v.* Forbes	1 C. P. D. 51	310
White *v.* City of London Brewery Company	42 Ch. D. 237	16
Willis *v.* Hiscox	4 My. & Cr. 197	181
Willock *v.* Noble	Law Rep. 7 H. L. 580	292
Wilson *v.* Bury (Lord)	5 Q. B. D. 518	273
Witt *v.* Corcoran	2 Ch. D. 69	135
Wood *v.* Anderston Foundry Company	36 W. R. 918	471
Woodthorpe, Ex parte	8 Morrell, 236	140
Woodward *v.* Sansum & Co.	4 Rep. Pat. Cas. 166	77
Woolley *v.* Colman	21 Ch. D. 169	111
Worledge *v.* Kingswell	Cro. Eliz. 794	380
Wray, In re	36 Ch. D. 138	63
Wyat Wild's Case	8 Rep. 78 b.	395
Wyrley Canal Company *v.* Bradley	7 East, 368	441

Z.

Zouch *v.* Parsons	3 Burr. 1794	284

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

JOHNSON *v.* EDGE.

C. A.
1891
MATHEW, J.
Dec. 4.
C. A.
1892
Feb. 1.

[1891 J. 86.]

Patent—Infringement—Action to restrain Threats—Circular—General Notice—Prosecution of Action—Due Diligence—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

A. & Co., *B.* and *H.* were all three rival manufacturers of "blue," and *B.* had in 1884 taken out a patent for a particular method of wrapping up his blue. In August, 1890, *H.* began using similar wrappers, and in February, 1890, *B.* brought an action against him for having passed off his goods as those of *B.*, in which action *B.*, in November, 1890, recovered £500 damages. About that time *A. & Co.* began using wrappers something like *B.'s*. Between August and November, 1890, *B.* sent out in his boxes of blue the following circular signed by his solicitors: "Notice to grocers and others,—Information of extensive violation of Mr. *B.'s* patent rights has been received, all parties are warned not to infringe these rights." This circular was received by some of *A. & Co.'s* customers, though not by *A. & Co.* themselves. In December, 1890, *B.* brought an action against *A. & Co.* for fraudulently passing off their goods as his, and on the 31st of January, 1891, he amended his statement of claim by inserting a statement of his patent, and a claim for infringement. Meanwhile on the 16th of June, 1891, *A. & Co.* brought this action under sect. 32 of the *Patents, Designs, and Trade Marks Act* of 1883, to restrain *B.* from threatening their customers (amongst other things) by the circular. In June, 1891, *B.'s* patent was revoked by consent upon a petition presented by *A. & Co.*, and *B.* discontinued that part of his action:—

Held, by the Court of Appeal (affirming the judgment of *Mathew*, J.), that (1.) *B.* had not prosecuted his action with due diligence; (2.) that *A. & Co.* were "persons aggrieved" within the meaning of the 32nd section of the Act of 1883; (3.) that the circular was not a mere "general

UNIVERSITY OF LONDON
Burlington Gardens,
LONDON, W.

C. A.
1892
JOHNSON
v.
EDGE.

warning" within the principle of *Challender* v. *Royle* (1), but was a threat within the 32nd section; and (4.) that *A. & Co.* were entitled to an inquiry as to damages.

Per Lindley, L.J.: Upon the true construction of sect. 32 it may apply to an intended infringement, provided it be shewn that the intended infringement, if carried out, would be an actual infringement.

APPEAL from Mr. Justice *Mathew*, sitting for Mr. Justice *Stirling*.

This was an action brought under sect. 32 of the *Patents, Designs, and Trade Marks Act* of 1883 (2) by Messrs. *Johnson & Co.* of *Liverpool*, against Mr. *William Edge* of *Bolton*, for an injunction to restrain him from threatening, by circulars, advertisements or otherwise, any customers of the Plaintiffs, or any other person, with any legal proceedings or liability in respect of any manufacture, sale, exhibition or offering for sale or purchase of "blue" packed in bags, and alleged to be so packed in infringement of the Defendant's letters patent of 1884 and 1887.

The Plaintiffs and the Defendant were rival manufacturers of "blue," and the alleged threat was contained in a printed circular signed by the Defendant's solicitors which the Defendant had placed in the boxes sent to his customers containing his blue. The circular thus issued was in the following words: "Notice to Grocers and others. Information of extensive violation of Mr. *William Edge's* patent rights has been received. All parties are warned not to infringe these rights.—*R. & R. C. Winder*, Solicitors, *Bowkers Row, Bolton, England.*"

The circumstances under which this circular was issued were shortly as follows:—

The Defendant *Edge* in September, 1884, took out a patent for

(1) 36 Ch. D. 425.

(2) Sect. 32 is (so far as material) as follows: "Where any person claiming to be the patentee of an invention, by circulars advertisements or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby. . . . Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

making up "blue" in a bag or cloth of fibrous substance with or without a handle. In July, 1887, he amended his specification by (amongst other particulars) abandoning the claim for blue packed without a handle, and he sold large quantities of what he called "*Dolly Blue*" wrapped up in little bags and packed in boxes.

In August, 1889, one *Harrison*, who was also a manufacturer of blue, began to sell his blue in wrappers resembling those of *Edge*. Thereupon *Edge*, in or about September, 1890, began to issue the circular above set forth, by placing it in all the boxes of his blue sent out; and in February, 1890, he also brought an action against *Harrison* and others in the Queen's Bench Division, not for infringement of his patent, but for damages, upon the ground that *Harrison* had passed off his goods as those of *Edge*.

In this action *Edge* in November, 1890, recovered £500 damages.

Meanwhile the Plaintiffs, *Johnson & Co.*, had begun to sell their blue in bags or wrappers somewhat resembling *Edge's*; and on the 11th of December, 1890, *Edge* commenced an action against them for an injunction to restrain them from fraudulently passing off their goods as his, but not seeking in the first instance any relief in respect of the infringement of his alleged patent rights. The issue of the circulars was continued by *Edge* up to November, 1890, and several of them were received by customers of *Johnson & Co.*, though it did not appear that any were received by *Johnson & Co.* themselves.

On the 16th of January, 1891, *Johnson & Co.* issued their writ in this action.

On the 31st of January, 1891, *Edge* amended his action against *Johnson & Co.* by inserting a statement of his patent, and claiming an injunction to restrain them from infringing it.

Upon a petition presented by *Johnson & Co.* for the revocation of *Edge's* patent, *Edge* afterwards admitted its invalidity, the patent was by consent revoked, and *Edge* discontinued that part of his action. The litigation in *Edge* v. *Johnson & Co.* was, however, continued as to the rest of the relief claimed, and judgment was given for *Johnson & Co.*; then a new trial was directed,

C. A. 1892 JOHNSON v. EDGE.

and it was stated at the Bar that an appeal to the House of Lords was now pending.

The present action came on for trial on the 4th of December, 1891, before Mr. Justice *Mathew*, sitting for Mr. Justice *Stirling*.

Roger Wallace (*Moulton*, Q.C., with him), for the Plaintiffs:—

The Defendant now admits that he has no patent rights, he must therefore shew that he has commenced and prosecuted an action with due diligence within the proviso to sect. 32. Such an action must be a *bonâ fide* action and not instituted, as I suggest the Defendant's action was, merely for the sake of bringing himself within the section. Moreover, his action was not brought within a reasonable time nor prosecuted with due diligence.

[He was stopped by the Court.]

Bousfield, Q.C., and *T. L. Wilkinson*, for the Defendant:—

In order to bring the case within sect. 32 of the Act there must be something more than a mere general notice to all the world that you have a patent and intend to prosecute people who infringe it. It is not only the right, but the duty of every person who has a patent to tell the public generally that he has a patent and intends to protect it. There has never yet been a case decided in which a mere issue of a general notice to the world at large like this, has been held to constitute a cause of action within sect. 32. The action is manifestly directed to something specific, and not to a mere general warning.

[MATHEW, J.:—If this notice had been served by the Defendant upon the Plaintiffs, that would have made a difference, I suppose?]

Yes, because then it would probably have been directed against the particular thing which the Plaintiffs were doing; but the issue of a general notice like this is not actionable under the section. No doubt the circular was issued to individuals, but it was not pointed at any "alleged manufacture, use or sale." It contained no intimation that the Plaintiffs were doing anything that we alleged to be an infringement of our patent.

A mere general statement by a person that he claims to be the owner of a valid patent which he intends to protect is not

actionable under the section: *Challender* v. *Royle* (1); *Ungar* v. *Sugg* (2). Further, we say that we did under the circumstances with due diligence commence an action for infringement within the proviso to sect. 32. We commenced an action and prosecuted it up to the point when we found that our patent was a bad one: *Colley* v. *Hart* (3).

Wallace, in reply:—

We are entitled to relief under the section as "persons aggrieved" by the threats of the Defendant, which have interfered with the sale of our goods.

The contention of the Defendant is founded on a *dictum* of Lord Justice *Bowen*, in *Challender* v. *Royle*, to the effect that mere threats or warnings as to something which might be done in the future would not fall within the section. But that *dictum* was given in a very qualified manner, and does not bear the construction which is sought to be put upon it, that if you disseminate threats very widely and injure a person to a great extent, then you are to have immunity; but if you restrict it to a few individual cases then you may be held liable in damages. The Defendant's action against us was not, as a patent action, *bonâ fide*.

The Plaintiffs are entitled to an inquiry as to what damages they have suffered by reason of the Defendant's threats.

MATHEW, J.:—

I think the Plaintiffs have brought themselves within the 32nd section of the Act, and have satisfied me that threats by circulars have been addressed to customers of theirs, menacing them with legal proceedings, or liability in respect of the sale of articles which infringe the alleged invention. That is made out by proof that there was circulated by the Defendant this notice, which purported to come from Defendant's solicitors.

[His Lordship then read the circular above set forth, and continued:—]

That circular was sent out with the goods of the Defendant,

(1) 36 Ch. D. 425, 441. (2) 8 Rep. Pat. Cas. 385.
(3) 44 Ch. D. 179.

C. A. 1892 JOHNSON v. EDGE. Mathew, J.

and warned everybody who took those goods that the person taking them might find himself involved in liability for an infringement of the patent right alleged here, if he bought other goods of a similar nature. It seems to me that that is what this section points at. It enacts that "where any person claiming to be the patentee of an invention by circulars, advertisements or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale or purchase of the invention, any person or persons aggrieved thereby may bring an action." I thought at first sight that the section was confined to persons to whom the threat was issued; but it appears clear, when the section is examined more closely, that it may be a person other than the person to whom the threat is issued, who is "aggrieved" by that threat having been issued. Therefore, this case comes within the language of the section.

But it was said, in answer to that, that there was a proviso in the section which protected the Defendant. The proviso is that the section "shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." I am clearly of opinion that the action which was prosecuted here, such as it was, was not prosecuted with due diligence, and that the Defendant was driven to bring an action claiming for infringement of the patent in which there is every reason to suppose he did not in the least believe. It was not until proceedings were taken against him to revoke his patent, that, in order to escape from the claim which he thought might arise under this section, he appears to have been advised that he had better amend the action, originally brought for another purpose, by the insertion of a claim which was abandoned almost as soon as it was put forward. Under these circumstances it appears to me that the Plaintiffs have made out a *primâ facie* case to have an inquiry as to damages, and I think that an order to that effect should be made. With reference to the claim for an injunction, I understand that an undertaking has already been given that the circulars shall not be issued or used again and, that undertaking being continued, I shall not direct an injunction to issue, but there will be liberty to apply if there is any reason to complain.

There will be the usual reference to one of the Official Referees, and the costs will be reserved until I hear the result of his report. C. A. 1892 JOHNSON v. EDGE. Mathew, J.

I hold that the circular complained of is not a general warning. It is a threat directed to the persons to whom it was sent. I do not consider it general within the meaning of the decisions relied upon by the Defendant. Nor do I consider the case is concluded by those decisions. I think this is a threat within the meaning of the section.

G. A. S.

The Defendant appealed. The appeal was heard on the 1st of February, 1892. C. A.

Bousfield, Q.C., and *T. L. Wilkinson*, for the Appellant:—

In order to entitle a person to sue under sect. 32 of the Act of 1883 the threat must be pointed at some alleged use of the invention. It must be specific, such as "*Johnson's* use." Here there is nothing pointing to *Johnson*. It is a mere general "warning in the air." There is no evidence that through our travellers or agents, or in any other way, we had pointed at *Johnson*, and when these circulars were first issued we knew nothing about him. It is true that the 32nd section gives the right to sue to "any person aggrieved," but it only gives the right in cases where the threat has been made in respect of some "alleged manufacture, use, sale, or purchase of the invention." It gives it in respect of nothing else, and there must be an alleged manufacture, use, sale, or purchase to bring this section into operation. So we must have somehow alleged that *Johnson* did one of these things. This circular, however, is nothing more than a warning to the public that *Edge* has a patent, and that persons who infringe it will be proceeded against. The right of the patentee to give such information to the public is a beneficial one, and is not interfered with by the section.

[They also made use of the arguments, and cited the authorities adduced by them in the Court below, and in addition referred to *Kurtz* v. *Spence* (1), and *Proctor* v. *Bennis* (2).]

(1) 36 Ch. D. 770. (2) 36 Ch. D. 740.

C. A. 1892 JOHNSON v. EDGE.

Moulton, Q.C., and *Roger Wallace*, for the Respondents, were not called upon.

LINDLEY, L.J.:—

The question raised in this case is one of some importance; and speaking broadly, it is, what is the true interpretation of sect. 32 of the *Patents Act*, 1883, as applied to a particular alleged threat or warning which I will read presently. Before I do that I will state shortly the position of the parties at the time of this litigation.

[His Lordship then stated the facts of the case, to the effect above set forth, and then continued:—]

The litigation between Mr. *Edge* and Messrs. *Johnson & Co.* has unfortunately by no means ended. There was a trial in which Mr. Justice *Denman* gave judgment for the defendant. On appeal there was a new trial. Now there is an appeal to the House of Lords, and when that controversy between Mr. *Edge* and Mr. *Johnson* will be settled I do not know, but that is the position of affairs. Now, pending that litigation, in January, 1891, Mr. *Johnson* issued his writ against Mr. *Edge* under the 32nd section of the *Patents Act*, 1883, and claimed an injunction to restrain him from issuing this circular. He also claimed damages, which he says he has sustained by reason of the issue of this circular. The case was tried before Mr. Justice *Mathew* upon the evidence which was adduced in this particular action of *Johnson* v. *Edge*, and, as I understand it, without going into any evidence in the other action which was still undecided, Mr. Justice *Mathew* came to the conclusion that an action would lie under the 32nd section, and that Mr. *Johnson* was a "person aggrieved," and he directed an inquiry as to damages before the Official Referee. The question now is whether Mr. Justice *Mathew's* view was right.

The appeal to us is upon the broader ground that this is not such a threat as was contemplated by the Legislature when it passed sect. 32 of the *Patents Act*, 1883. That section runs thus: [His Lordship read it.] I pass over the proviso because, although something apparently turned upon it, Mr. *Bousfield* practically abandoned that. Mr. Justice *Mathew*

found that the amendment of the action brought by Mr. *Edge* against Mr. *Johnson*, which turned the action into an action for the infringement of a patent, was not an action brought "with due diligence." And considering that Mr. *Edge's* patent was revoked or abandoned, or got rid of soon after, I am not at all surprised. Now, before I comment upon this section I must say that I think it would be extremely regrettable if we were to construe it so as to say that it did not apply to a man who has a rubbishy patent—a patent that is not worth a farthing—and who threatens to prosecute people for infringing that patent. I do not say that Mr. *Edge* when he got this patent knew it was rubbishy, and knew it was worthless. I dare say he did not; I do not know. But that it was worth nothing at all is, I think, pretty plain from the course that has been taken about it. In the first place, we are told that there was a previous patent, which, of course, would invalidate it. But the moment it was challenged it was given up, and, indeed, the letters patent have since been revoked.

Mr. *Bousfield's* main point is, that this section has been already construed by this Court in the case of *Challender* v. *Royle* (1), and that it was there held or decided, especially by Lord Justice *Bowen*, not to apply to mere "general warnings." We had the judgment of Lord Justice *Bowen* in that case read to us, and, speaking subject to one qualification which I will mention presently, it appears to me that the construction put by the learned Judge on that section is right. I cannot suppose that the section prevents a patentee from saying that which the patent itself implies, namely, that anybody infringing must expect legal proceedings to be taken against him. I do not think it can mean that. It is merely saying what everybody knows already. That is not a threat against anybody in particular. The Lord Justice went on to say, as I understand him, that he doubted whether this section would apply unless there had been an actual infringement. I should like to qualify that by saying that I think, upon the true construction of this section, the section might apply to an intended infringement provided that you could shew that the intended infringement, if carried out, would be an actual infringement. I can understand a man

(1) 36 Ch. D. 425.

C. A. 1892 JOHNSON v. EDGE. Lindley, L.J.

issuing a prospectus, and issuing circulars and notices to the effect that he was going to make something which would be an infringement of a patentee's right. I am not prepared to say that the patentee could not threaten to stop him, and bring himself within the section. I should not like to say that the section would not apply to such a case simply because the threat preceded the actual damage. I doubt whether it would not. I also doubt whether Lord Justice *Bowen* in *Challender* v. *Royle* (1) meant to address his mind to such a case as that. He had not got it before him. It is only because his language is very general that I thought it desirable to make that qualification of what otherwise appears to me to be a very correct interpretation of the section.

Now, Mr. *Bousfield* has invited us to say that this is nothing more than a warning by Mr. *Edge* that he has a patent, and that infringers of it will be proceeded against. It appears to me to go very far beyond that. It refers to a violation of his patent. It says that information of extensive violation of his patent rights has been received. Now this is addressed to the trade. What can that mean to people in the trade? What would they understand by it? If they addressed their minds to it at all they would consider by whom this could have been infringed. Who could have violated Mr. *Edge's* patent? At one time they would know of no possible violation so far as the evidence goes, except *Harrison's*. They would say, "Well, it may be *Harrison's*. Probably it is *Harrison's*." If they had turned their attention to it after Mr. *Johnson's* proceedings they would say, "That is addressed to *Harrison* and *Johnson*. We know those two. They are making things more or less like Mr. *Edge's*. It must be those things that are referred to." It must therefore be construed as an intimation by Mr. *Edge* that he considered those things an infringement of his patent. That would be the inference drawn, and that is addressing it to Mr. *Harrison* and to Mr. *Johnson*. It is far more than a warning. The effect of it is this: "Mind, I have got a patent, and I intend to protect it. Do not infringe it." It is an intimation that these were infringements, and it would be so understood

(1) 36 Ch. D. 425.

by people in the trade. That appears to me to take this case entirely out of such "general warnings" as were alluded to by Lord Justice *Bowen* in *Challender* v. *Royle* (1), and which I think would not be within the section at all. That was the view taken by Mr. Justice *Mathew*. It is quite obvious from his observations at the end of his judgment that he meant that very thing when he said that he did not think that this was a "general warning" such as was alluded to in the cases that had been decided. It is a great deal more. It is an intimation that Mr. *Johnson* and Mr. *Harrison* have been infringing Mr. *Edge's* patent, and a warning to the persons to whom the circular is sent, not to sell things got up like his, because they are all infringements. That is the whole gist and substance of this circular. It appears to me, therefore, that Mr. Justice *Mathew* was right, and that this appeal must be dismissed with costs.

LOPES, L.J.:—

I have very little to add. I entirely agree with what has been said by Lord Justice *Lindley*. There is only one observation I would make in regard to a point which was also made respecting this notice. It was said that it was not a threat within the meaning of the 32nd section of the *Patents Act*, 1883. I think it is impossible that anybody who reads it can come to that conclusion. The words of it are: "Information of extensive violation of Mr. *Edge's* patent rights has been received," and then follow the words, "All parties are warned not to infringe these rights." What could that mean, but that parties who infringe these rights would be proceeded against? I do not see what the object of the notice would be otherwise. I do not see what other objects it could have in view. I have not the slightest doubt in my own mind that it does constitute a threat within the meaning of the 32nd section.

KAY, L.J.:—

I have only a few words to add upon this 32nd section. I think that all that Lord Justice *Bowen* intended in his judgment

(1) 36 Ch. D. 425.

C. A. 1892 JOHNSON v EDGE. Kay, L.J.

in *Challender* v. *Royle* (1) was that it might not be within sect. 32 if a man stated "I have got a patent, and I mean to protect that patent by enforcing all my legal rights under it." A general warning of that kind, not pointed against any particular person, and which would not be by the public understood to apply to any particular person, might not be within the 32nd section at all. I do not think that Lord Justice *Bowen's* language was intended to go further than that. If it was, I should certainly ask leave to reserve my own opinion until the particular case of a warning against future infringements came before the Court and had to be tried. I can conceive one case of future infringement which would come entirely within the mischief which this section was intended to provide against. Suppose a man issued a circular saying, "I have a patent for such and such an article. I understand that Messrs. *A. & Co.* have recently erected a large manufactory for the purpose of manufacturing articles which, if made, will be an infringement of my patent." Can it be said that a case like that would not come within the mischief intended to be provided against by this section? Could not Messrs. *A. & Co.* bring an action against the person who issued that circular for an injunction? I should wish at least to suspend my opinion on that subject until that point comes before the Court of Appeal to be tried. No doubt there are some words in Lord Justice *Bowen's* judgment in *Challender* v. *Royle* which would seem, if they are read alone, to go as far as that, because he says: "The section gives for the first time a new right of action, a right of action to a person who is aggrieved by a threat proceeding from a patentee against somebody in respect of an alleged manufacture, use, sale, or purchase of the patentee's invention. I think those words indicate that the threat, which is to be the subject-matter of the action, must not be merely a warning about something that is going to be done, but must be a threat about an act done, a threat of legal proceedings or liability in respect of an alleged manufacture, use, sale, or purchase of the invention, not in respect of a proposed manufacture, use, sale, or purchase." Well at present, I am not quite satisfied that the words "alleged

(1) 36 Ch. D. 425, 440.

C. A. 1892 JOHNSON v. EDGE. Kay, L.J.

manufacture, use, sale, or purchase," in the 32nd section may not include alleged intended use. I am not certain that it is necessary to refer them to a use that at the time has been actually made, and the case which I gave as an illustration just now seems to me to be one which would be excluded from the section altogether if you read those words as meaning only the use which had been actually made at the time the circular was issued. It would give too restricted a meaning to the section if it was so confined. But this circular, even if that were the meaning of the section, does not come within the exception that Lord Justice *Bowen* mentions, because this circular in the beginning of it does speak of an infringement which had been made at the time when the circular was issued. It says: "Information of extensive violation of Mr. *William Edge's* patent rights has been received." Therefore this circular certainly is one which Lord Justice *Bowen* would not have excepted from the operation of the section. That it goes on to threaten in respect of future infringements does not make it a "general warning" by any means within the sense in which those words are used in the judgment of Lord Justice *Bowen*. Therefore, for both those reasons, I entirely agree with the judgment pronounced by Lord Justice *Lindley*, and I think the appeal must be dismissed with costs.

Solicitors: *Indermaur & Brown*, agents for *R. & R. C. Winder, Bolton*; *Paddison, Son, & Fullilove.*

W. W. K.

STEERS *v.* ROGERS.

C. A. 1892 ROMER, J. *Jan.* 16. C. A. *Feb.* 24.

[1889 S. 2233.]

Patent—Co-owners by Purchase—One Co-owner Mortgagee of other Co-owner's Share—Patent Worked by Mortgagee Co-owner — Redemption — Profits received as Mortgagee.

A co-owner of a patent is entitled to work it for himself, whether his part-ownership was acquired by a joint grant or by assignment from a prior part-owner.

R., who was assignee of a moiety of a patent, and claimed to be owner

C. A.
1892
STEERS
v.
ROGERS.

of the other moiety by purchase from a mortgagee of *S.*, the owner of that moiety, made machines according to the patent, and sold them at a profit, but did not grant licenses or receive royalties. *S.* brought his action to impeach the sale and to redeem. At the trial it was admitted that the sale of the second moiety to *R.* was bad, and that he could only be treated as transferee of the mortgage. By consent judgment was given, directing (1) an account of what was due on the mortgage; (2) an account of profits "come to the hands of *R.*, as such mortgagee as aforesaid." *R.* filed an affidavit stating that he had worked the patent in the exercise of his rights as co-owner, and submitted that the profits he had made were not received by him as mortgagee, and that he was not liable to account for them:—

Held, by *Romer*, J., and by the Court of Appeal, that as *R.* had not received royalties, and the profits which he had made were derived only from his using the patents, which as co-owner he was entitled to do, they were not profits received by him as mortgagee, and he was not liable to account for them, and that the form of the judgment did not preclude his taking the objection.

BY deed dated the 20th of December, 1884, the Plaintiff purported to assign to *J. J. Rossiter*, by way of mortgage, certain letters patent which had, in the year 1877, been granted to *F. D. Marshall*, for an invention for "Improvements in the manufacture of gas, and in apparatus therefor." The Plaintiff at this time was entitled only to a moiety of the patent; the shares making up the other moiety being vested in different persons.

By deed dated the 30th of June, 1886, *Rossiter* transferred his security to the Defendant *Sauer*.

By deed dated the 14th of August, 1886, and made between the Defendant *Sauer* of the one part, and the Defendant *Rogers* of the other part, the Defendant *Sauer* purported, in exercise of his power of sale as mortgagee, to sell and assign the said letters patent to the Defendant *Rogers*. On the same day *Sauer*, who had got in the other shares of the patent, assigned them to *Rogers*, who thenceforth worked the patent on the footing of being sole owner.

This action was commenced in June, 1889, and the Plaintiff, by his statement of claim, stated that the letters patent had been transferred to him in 1879, and set forth the mortgage of the 20th of December, 1884, the transfer of the 30th of June, 1886, and the sale of the 14th of August, 1886, without any

allusion to the fact that when the mortgage was made the Defendant was not sole owner of the patent. The Plaintiff alleged that *Sauer* took the transfer of the 30th of June, 1886, as trustee for *Rogers*, and that the sale purporting to be effected by the deed of the 14th of August, 1886, was fraudulent and collusive, and ought to be set aside, and claimed relief accordingly; or, in the alternative, a declaration that the deed of the 14th of August, 1886, ought to stand only as a transfer of the mortgage of the 20th of December, 1884, and for an account of what was due under that mortgage, with liberty to the Plaintiff to redeem on payment of the amount so found due.

Rogers, by his statement of defence, did not admit that the Defendant *Sauer* took the said transfer as trustee for him, or that the said sale was fraudulent or collusive; and alleged, in effect, that at the date of the mortgage of the 20th of December, 1884, the Plaintiff was only interested in one moiety of the letters patent, that the remaining moiety was at that date outstanding in several persons in certain shares, and that after divers mesne assignments, ultimately by another deed, dated the 14th of August, 1886, all such outstanding shares and interest became absolutely vested in him as purchaser. The Defendant *Sauer* did not put in a defence, and did not appear at the trial.

The action was tried before Mr. Justice *Romer*, and on the 5th of February, 1891, judgment was given, "Defendant, *H. J. Rogers*, by his counsel admitting that the transfer made on the 30th of June, 1886, to the Defendant, *B. H. Sauer*, of the mortgage of the 20th of December, 1884, in the pleadings mentioned was made to such last-named Defendant as trustee for the Defendant, *H. J. Rogers*, and the Plaintiff and the Defendant *H. J. Rogers*, respectively, by their counsel admitting that the Defendant *H. J. Rogers* is to be regarded as being in the position of a transferee of the mortgage debt and securities in the pleadings mentioned, and admitting, as between the Plaintiff and the Defendant *H. J. Rogers*, that the Defendant *H. J. Rogers* is possessed in his own right of one moiety of the letters patent in the pleadings mentioned, and that the equity of redemption of the other moiety is vested in the Plaintiff subject to the said mortgage; this Court doth by consent order and adjudge that the following

C. A. 1892 STEERS v. ROGERS.

accounts be taken. That is to say: (1.) An account of what was due to *Rogers* under his mortgage; and (2.) an account of all profits since the 30th of June, 1886, come to the hands of the Defendant *H. J. Rogers* as such mortgagee as aforesaid, or to the hands of any other person or persons by the order for the use of the said Defendant, or which without the wilful default of the said Defendant *H. J. Rogers*, might have been so received in respect of the said letters patent."

The Defendant applied to vary the minutes as regarded the form of account No. 2, but Mr. Justice *Romer* refused the application.

In answer to account No. 2, directed by the judgment, the Defendant *Rogers* filed an affidavit, wherein he stated that since the 30th of June, 1886, he had laid out £4500 in working the patent, by manufacturing and selling apparatus made according to it, and had made gross profits not exceeding £1000, and continued:—"I worked the said patent in the exercise of my rights as co-owner, and except as aforesaid I have not received any profits in respect of the same. I submit that the said profits were not received by me as mortgagee, and that I am entitled to retain absolutely for my own use the whole of the said profits, and that the Plaintiff is not entitled to claim a share of the same. The Plaintiff has not been, and is not, my partner in any way, and has contributed neither skill, time, nor money in respect of the manufacture, sale, or erection of the apparatus; nor is he, as I am advised, accountable, nor does he offer, to bear any loss or expense incurred by me in respect of my working as a co-owner the said letters patent." The Plaintiff took out a summons (which was adjourned into Court) to compel the Defendant to render a full account of his profits.

The summons was heard before Mr. Justice *Romer* on the 16th of January, 1892.

Bartley Denniss, for the Defendant:—

The joint grantee of a patent can work the patent without rendering any account of the profits he makes: *Mathers* v. *Green* (1); *White* v. *City of London Brewery Company* (2). The same prin-

(1) Law Rep. 1 Ch. 29. (2) 42 Ch. D. 237.

ciple applies to the co-owner by purchase of a patent; and the fact that he is mortgagee of the other co-owner's share makes no difference. The Defendant is not too late, under the circumstances, in taking the objection.

E. C. Willis, Q.C., and *Agabeg*, for the Plaintiff:—

The Defendant is bound by the form of the judgment. He submitted to account as mortgagee in possession, and it is now too late for him to object. There is a distinction between a joint grantee of a patent and a co-assignee by purchase.

ROMER, J.:—

I have inquired into this matter; and I do not think the delay that has occurred ought to be in this particular case a bar. I find that the parties have hitherto been devoting themselves to the first account, which would not cover the account upon which the question now arises. I am bound to say, from what I have heard from the Chief Clerk (because I was rather startled with the time that has been taken in proceeding with the first account), that the cause of the delay has been the conduct of both parties before him. Instead of the parties trying in a business-like manner to dispose of the account, they have so wrangled and wasted his time, that he has found it impossible to dispose of that account earlier. Both parties have been equally to blame. I will, therefore, not allow the delay to be a bar to this application; but I shall bear in mind the conduct of the parties when I come to deal with the question of costs.

In order to decide this application I have, in the first place, to consider a somewhat important point, which is this: If two persons each own one-half of a patent, can one work the patented invention without the consent of the other? and if he does so work, is he bound to account for half the profits to the other? The point appears not to have been previously expressly decided. It has been decided that where there is a grant to joint patentees, each patentee may work without the consent of the other, and if he does work he is not bound to account for any profits to his co-patentee. Is there a difference if, owing to assignments, the patent comes to be divided in ownership absolutely

C. A. 1892 STEERS v. ROGERS. Romer, J.

between two or more people? Having regard to what has been decided with regard to joint grantees of a patent, and to general considerations applicable to the case, I think there ought to be no distinction of the kind as between joint patentees and such owners of shares in a patent as I am mentioning. I am not prepared to hold, and therefore shall not hold, that the owner of a share of a patent is not entitled to work it without being regarded as in some way by so doing infringing the rights of the owner of the other shares of the patent. If he is entitled to work the patented invention, I cannot imply any contract whereby he can be made to account for any share of the profits of his working to the owner of the other shares of the patent. It would, I think, lead to strange results if the contrary were held. I do not see why, if two grantees of a patent choose to define their interests more completely and assign the patent half to one and half to the other, that in itself should be held to have deprived each of the right of working that which he had previously possessed. Again, if the view opposite to that which I am taking were held, it would lead to great difficulties in the position of owners of shares of patents; because, in practice, unless the co-owners could be made to agree, the invention could not be used without, at any rate, a very great risk on the part of the person using it. It would, I think, be hard if the owner of a share of a patent, who could not get his co-owner to join in selling, or licensing, or working the patent, should be held to have no rights whatever. It would be extremely hard if the owner of a share of a patent, who expended money in working it and in trying to make it useful, should be placed in the position that if he lost by his work he could not call upon his co-owners to take part in the loss, whereas, if he succeeded, his co-owners, who would do nothing to assist him, could call upon him for a share of the profits.

For these reasons I hold that a co-owner of a patented invention is entitled to work it for himself; and that, if he does work it, he is not bound to account for any share of profits to an owner of another share of the patent. But then it is said that, assuming that to be the general rule, the Defendant in this action, who was owner in his own right of half of the patent, and

only owner of the other half subject to the equity of redemption existing in the Plaintiff, is in a worse position than if he were merely owner of one half absolutely. In the first place, it is said that he is prejudiced by the form of the account, which calls upon him as mortgagee to account for all the profits received, or which, but for his wilful default, might have been received by him in respect of his patent. It would, I am sure—for I remember what took place when the action came before me to be decided, and how this form of judgment came to be adopted—be very hard upon the Defendant in this case if he were to be prejudiced upon this point by the form of the account. I am certain it was never intended by the form of the account to prejudice the Defendant on this point. The point was not then before the Court, or considered by either party; the account was directed because it might well have been that the Defendant had made profits as mortgagee of the Plaintiff's half of the patent which he was bound to account for; for example, possibly with regard to any royalties which he might have received. But I think it certainly was not intended that the form of this judgment should make him account for any sums which, but for the form of the judgment, he would not be bound to account for. I hold, therefore, that the form of the account does not stop the Defendant in any way from raising the point now before me. But then it was said that the Defendant is in a worse position, because, when he worked the patent, he believed that he was absolute owner of the Plaintiff's half, and did not recognise at that time the Plaintiff's right to redeem that half. Does this place the Defendant in a worse position than he would otherwise have occupied? On the whole, I think it ought not to do so. I do not see that his belief in that matter ought to affect his rights. He being owner of half of a patent would, as I have pointed out previously, have been entitled to work the patented invention without any liability to account to the Plaintiff for profits. If he had then taken a mortgage of the Plaintiff's half I think it is clear that by so doing he could not have prejudiced the rights he previously possessed as owner of his own half; and, therefore, in that case, if he worked the patented invention, I think it could not be properly said against him that he was not

C. A. 1892 STEERS v. ROGERS. Romer, J.

working it in respect of his own half. As I have pointed out, if that were so in a case where he fully recognised the Plaintiff's right to redeem, I think it would be pressing it too hardly against him to say that he was deprived of that right because of his belief that he was absolute owner also of the Plaintiff's half. As a matter of fact, no doubt he has worked this patented invention. He was entitled to work it, as I have pointed out, as owner of his own half. Ought I now to say that I must hold that because he was also mortgagee of the other half he must now account for any share of those profits, which, but for the mortgage, he would have been entitled to retain for his own use? I think not. Under these circumstances, it appears to me that the Defendant cannot be called upon to account for the profits he has made in working the patented invention, or any share of those profits as mortgagee. That decides this application, for it is admitted before me that the only profits which in any way he can be said to be bound to account for as mortgagee are the profits derived from his own working of the patented invention. Under these circumstances, I dismiss the application, and seeing that it is a mortgagor's application as against a mortgagee, I must dismiss it with costs.

H. L. F.

C. A.

The Plaintiff appealed. The appeal was heard on the 24th of February, 1892.

E. C. Willis, Q.C., *Oswald*, and *Agabeg*, for the appeal:—

The judgment was made by consent, and the Defendant is bound by it to account as a mortgagee in possession of a moiety of the patent. He must, then, account for a moiety of the profits he has made by working.

[*Bartley Denniss*:—The Judge did not intend to decide what profits were received by the Defendant as mortgagee, and in making the order under appeal he expressly said that he had not meant to preclude, and did not understand the judgment as precluding, this question. As regards the judgment being by consent, its language quite admits of the construction which Mr. Justice *Romer* put upon it; and that construction ought to be given to it.]

The Defendant worked the patent on the footing of his being owner of the whole, and it is too late for him now to turn round and say that he worked it under his rights as owner of one moiety. He worked both moieties, and the profits must be regarded as attributable equally to the two moieties. The Defendant, therefore, ought to be ordered to bring in an account.

Bartley Denniss and *Barling*, for the Defendant, were not called upon.

LINDLEY, L.J.:—

This case is a peculiar one. In form it is an appeal from a refusal to issue a four-day order requiring Mr. *Rogers* to bring in an account of all profits since the 30th of June, 1886, "come to his hands as such mortgagee," as in the judgment mentioned. In order to understand the judgment, we must look to the position of the parties at the time it was pronounced. It appears that the Plaintiff was the owner of one-half of a patent. It appears further that the Defendant, Mr. *Rogers*, had become by purchase the owner of the other half of the patent. The Plaintiff's half had been mortgaged, and that mortgage had been transferred to a person of the name of *Sauer*, and *Sauer* purported to sell the half which was vested in him by way of mortgage under the power of sale to *Rogers*, so that on the 14th of August, 1886, *Rogers* claimed to be the sole owner of the patent. He was sole owner of half by purchase from other people through *Sauer*, and he claimed to be sole owner of the Plaintiff's half under the purchase from *Sauer* by exercise of his power of sale. The Plaintiff impeached the purchase which Mr. *Rogers* had made, or purported to make, from *Sauer*, and insisted that as regards that half *Rogers* should be treated only as mortgagee, and subject to redemption by the Plaintiff. That was the controversy at the time that the action came on for trial. Then an order was drawn up which I will read. [His Lordship read the order.] Then the further consideration is adjourned, the costs are reserved, and further consideration, and any application in the action requiring to be heard before the Judge in person, were

C. A. 1892 — STEERS v. ROGERS. — Lindley, L.J.

directed to be heard before Mr. Justice *Romer*, although in point of form the action was set down before Mr. Justice *Stirling*.

Now, in order to understand that order, the admitted facts in the recitals are of the utmost importance. The recitals are that *Rogers* is, for the purpose of taking these accounts, and for the purpose of working out that order, to be treated as owner of half of the patent. He is also to be treated as mortgagee in possession of the other half of the patent; and there is an account to be taken of what is due to him under the mortgage, and under these circumstances the account No. 2 is directed. The question that immediately arises is, what is meant by that account No. 2? It is an account of the profits since 1886 come to the hands of *Rogers* as mortgagee. *Rogers* then says, "Nothing has come to my hands as mortgagee." The account is not useless, because if *Rogers* had received profits in the shape of royalties under licenses, something might have come to his hands as mortgagee. The account would have covered such profits as I have just mentioned; but as regards any other profits, *Rogers* said then, and says now, "No profits have come to my hands as mortgagee; the profits which have come to my hands have come to my hands as co-owner." Is that contention, or is it not, consistent with the order? At first I thought it was not; but when I look at the recitals, I think it is consistent with the order. The order might mean—and I am not sure that it did not in the view of both parties mean—that *Rogers* was to account for all profits received by him as mortgagee, leaving open the question what profits were to be considered as received by him in that character. Now, Mr. Justice *Romer* has said distinctly that that was precisely the construction which he put upon it; that that is what he meant by it. Under these circumstances, when it is now ascertained beyond all controversy that there are no profits received by Mr. *Rogers* as mortgagee for which he is bound to account as mortgagee, and that the profit he has made is profit by working the patent as distinguished from profits obtained from granting licenses, Mr. Justice *Romer* says: "I shall not make against this gentleman a four-day order." The reason of this refusal is apparent. The judgment is dated the 5th of February, 1891. An affidavit was made by *Rogers* as early as the

10th of March, 1891; he has been cross-examined upon it at great length, and no four-day order is applied for, and nothing is done until the 27th of November, 1891. The facts were perfectly well known at an early stage, and I think that after the discussion which took place before Mr. Justice *Romer* this appeal ought not to have been brought. The parties ought to have been satisfied with the explanation of the decision and the view of the learned Judge.

I will merely add this by way of further remark, that nothing can be more inconvenient than to discuss questions of principle or questions of law upon an application for a four-day order. If a man is clearly bound to do a thing an application for a four-day order to compel him to do it is quite right; but if the liability to do it involves discussion, an application for a four-day order is an improper way of raising the question.

KAY, L.J.:—

I entirely agree. I also on first looking at this judgment understood it in a different sense from that in which I am now persuaded it was pronounced by the Judge, and as I cannot help believing was understood by both the parties at the time. Taking the events in the order in which they occurred they are these. Before the month of June, 1886, *Rogers*, the Defendant, was working the patent as agent of the Plaintiff. The Plaintiff had in 1884 purported to mortgage the patent to a man named *Rossiter*, but he had in fact previously assigned one-half of the patent to other persons. On the 30th of June, 1886, *Rogers* obtained an assignment of this mortgage to a man named *Sauer*, *Rogers* paying the money. That explains the date of the 30th of June, 1886, from which time the judgment directs the account to be taken, the transfer practically being to *Rogers*, though it was taken in the name of *Sauer*. Now, on the 14th of August in the same year, 1886, *Rogers* affected to buy the patent from *Sauer* under the power in the mortgage. He also on the same day took a transfer from *Sauer* of that moiety of the patent which had been assigned by the Plaintiff to other persons, *Sauer* having bought up their shares. The Plaintiff contested the right of *Rogers* to be treated as purchaser under the power

C. A. 1892 STEERS v. ROGERS. Kay, L.J.

in the mortgage deed, and on the 14th of June, 1889, brought this action, in which he sets up alternative claims. First of all he claims to set aside the sale as being fraudulent and void, and asks for an injunction to restrain assignment of the patent, and for damages and an account of sales and profits. In the alternative, he claims a declaration that the deed of the 14th of August, 1886, the assignment by *Sauer* to *Rogers*, ought to stand only as a transfer of the mortgage of the 20th of December, 1884, and asks an account of what is due on that footing. The writ was issued on the 14th of June, 1889. On the 5th of February, 1891, the judgment was given, which has been read by Lord Justice *Lindley*. In March, 1891, an affidavit was put in by the accounting party raising the very question which is now raised on this appeal. The Defendant *Rogers*, of course, was not bound to account for any profits he had made in respect of the moiety which belonged to himself absolutely, and as to the other moiety, he says: "There are no royalties, and I have received no profits as mortgagee." The Plaintiff does not apply then for a four-day order, but, on the contrary, treats that affidavit as a sort of account delivered by him, and for two days the Defendant *Rogers* is subjected to cross-examination on that affidavit. Then the inquiry lasts for seven months, and during all that time there is no application for a four-day order to make him bring in an account. On the 27th of November, 1891, this application is made for the first time for a four-day order asking that this man, who had filed an affidavit raising the question as early as March, 1891, who had been cross-examined upon it for two days, against whom the account had been pending (with many attendances, as we are told) for seven months, should bring in an account. I can only say that that, to my mind, is the most inconvenient form of proceeding possible, and there are many circumstances in the case which would have induced me to refuse any four-day order independently of the merits of the question which was raised. But the Plaintiff's contention on this application is this: that the judgment did not mean what it says, that the Defendant was only to account as mortgagee in possession for profits he had made as such mortgagee in possession, but meant that he was to

account for all the profits he had made in respect of the patent, and that the Plaintiff would be entitled to at least half of those profits. At first I did not see the true meaning of the judgment, but the more you consider it, the more thoroughly you appreciate the facts, the more clearly you see that the judgment is in terms confined to such profits as the Defendant made as mortgagee in possession. But he was only mortgagee in possession of one moiety. Therefore, the profits for which he was to account are the profits made by him as mortgagee in respect of that moiety of which he was mortgagee in possession. He says: "I have received no profits as mortgagee in possession; I had a perfect right to work this patent, being absolute owner of the other half of it; I have worked it according to my right; I have made profits in respect of that half, and nobody can make me account for them." That is the law which applies to co-owners of patents, and which has been asserted in the case of *Mathers* v. *Green* (1) and other cases. The Defendant says (and this is the point he raised by his affidavit in March, 1891): "I have made no profits at all except such as are attributable to my own moiety." Now, is that defence precluded by this judgment? The judgment which professes to be by consent has been read by Lord Justice *Lindley*, and I will only refer to the words "come to the hands of the Defendant *Rogers* as such mortgagee as aforesaid." After the judgment had been pronounced an application was made on behalf of the Defendant to have the form of words somewhat altered, because he thought that some such construction as that which is sought to be raised might possibly be put upon the judgment, and that came before Mr. Justice *Romer*, who then had the matter fresh in his recollection, and he refused it with costs. As I understand from the shorthand notes of what passed he did not think it was at all necessary to make any such alteration. The point has now come before him again, and he says: "I am certain it was never intended by the form of the account to prejudice the Defendant on this point." Now, I said during the argument, and I beg leave to repeat, that it appears to me that one great object of the *Judicature Act* would be defeated if, when a Judge says, "I remember what took

(1) Law Rep. 1 Ch. 29.

C. A. 1892 STEERS v. ROGERS. Kay, L.J.

place before me when the judgment was pronounced, and I am quite certain it was not intended to prejudice the Defendant on this point," we were to say that the judgment which is quite capable of this construction is nevertheless to be construed otherwise. The scheme of the *Judicature Act* was that the Judge who had pronounced a judgment should have the carrying out of that judgment because he was more likely to understand it than another Judge who had not pronounced it. But then it is said, "This was not a judgment, it was a consent order; the question is not what the Judge understands by it, but what the parties understood by it, and what they understood by it was different from what the Judge has held it to mean." I do not agree with that. Suppose the parties disagreed, and tried to alter this judgment, and the Judge said: "I am perfectly certain that the meaning at the time was such as I say now," then they could not obtain any alteration. In fact, they never could have obtained any alteration if they disagreed about the meaning, unless one party could say that there had been some surprise upon him. Therefore, I am quite clear that this Court would be doing a very wrong thing if we were to put on that judgment pronounced by Mr. Justice *Romer* a different construction from that which he says he believes was intended at the time. In my opinion, this appeal is altogether wrong, and ought to be dismissed with costs.

Solicitors for Plaintiffs: *Hulbert & Crowe.*
Solicitors for Defendant: *Hood Barrs & Co.*

H. C. J.

HENTHORN *v.* FRASER.

C. A. 1892 March 3, 26.

[1891 H. 226.]

Contract by Letters—Acceptance of Offer by Post—Time of Acceptance—Withdrawal of Offer.

H., who lived at *Birkenhead*, called at the office of a land society in *Liverpool*, to negotiate for the purchase of some houses belonging to them. The secretary signed and handed to him a note giving him the option of purchase for fourteen days at £750. On the next day the secretary posted to *H.* a withdrawal of the offer. This withdrawal was posted between 12 and 1 o'clock, and did not reach *Birkenhead* till after 5 P.M. In the meantime *H.* had, at 3.50 P.M., posted to the secretary an unconditional acceptance of the offer, which was delivered in *Liverpool* after the society's office had closed, and was opened by the secretary on the following morning:—

Held, that where the circumstances under which an offer is made are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of it, the acceptance is complete as soon as it is posted.

Held, that in the present case, as the parties lived in different towns, an acceptance by post must have been within their contemplation, although the offer was not made by post.

Held, that a revocation of an offer is of no effect until brought to the mind of the person to whom the offer was made, and that therefore a revocation sent by post does not operate from the time of posting it.

Held, therefore (reversing the decision of the Vice-Chancellor of the County Palatine), that a binding contract was made on the posting of *H.*'s acceptance, that the revocation of the offer was too late, and that *H.* was entitled to specific performance.

In 1891 the Plaintiff was desirous of purchasing from the *Huskisson Benefit Building Society* certain houses in *Flamank Street, Birkenhead.* In May he, at the office of the society in *Chapel Street, Liverpool*, signed a memorandum drawn up by the secretary, offering £600 for the property, which offer was declined by the directors; and on the 1st of July he made in the same way an offer of £700, which was also declined. On the 7th of July he again called at the office, and the secretary verbally offered to sell to him for £750. This offer was reduced into writing, and was as follows:—

"I hereby give you the refusal of the *Flamank Street* property at £750 for fourteen days."

C. A. 1892 HENTHORN v. FRASER.

The secretary, after signing this, handed it to the Plaintiff, who took it away with him for consideration.

On the morning of the 8th another person called at the office, and offered £760 for the property, which was accepted, and a contract for purchase signed, subject to a condition for avoiding it if the society found that they could not withdraw from the offer to the Plaintiff.

Between 12 and 1 o'clock on that day the secretary posted to the Plaintiff, who resided in *Birkenhead*, the following letter:—

"Please take notice that my letter to you of the 7th instant, giving you the option of purchasing the property, *Flamank Street, Birkenhead*, for £750, in fourteen days, is withdrawn, and the offer cancelled."

This letter, it appeared, was delivered at the Plaintiff's address between 5 and 6 in the evening, but, as he was out, did not reach his hands till about 8 o'clock.

On the same 8th of July the Plaintiff's solicitor, by the Plaintiff's direction, wrote to the secretary as follows:—

"I am instructed by Mr. *James Henthorn* to write you, and accept your offer to sell the property, 1 to 17, *Flamank Street, Birkenhead*, at the price of £750. Kindly have contract prepared and forwarded to me."

This letter was addressed to the society's office, and was posted in *Birkenhead* at 3.50 P.M., was delivered at 8.30 P.M. after the closing of the office, and was received by the secretary on the following morning. The secretary replied, stating that the society's offer had been withdrawn.

The Plaintiff brought this action in the Court of the County Palatine for specific performance. The Vice-Chancellor dismissed the action, and the Plaintiff appealed.

Farwell, Q.C., and *T. R. Hughes*, for the appeal:—

We say that a binding contract was made when the Plaintiff's letter of acceptance was posted: *Dunlop* v. *Higgins* (1); *Harris's Case* (2); *Adams* v. *Lindsell* (3). We do not dispute that, though

(1) 1 H. L. C. 381. (2) Law Rep. 7 Ch. 587.
(3) 1 B. & Al. 681.

the option was given for fourteen days, it could be withdrawn within that time: *Dickinson* v. *Dodds* (1); but if a binding contract is entered into, there cannot be a withdrawal. Where an acceptance is to be signified by doing some particular thing, as soon as that particular thing is done there is a contract: *Brogden* v. *Metropolitan Railway Company* (2). Where it must be in the contemplation of the parties that an answer will be sent by post, the posting an acceptance makes a contract. In the case of *Household Fire and Carriage Accident Insurance Company* v. *Grant* (3) it was considered that, according to the usages of mankind, an acceptance would be sent by post; and it was held that posting an acceptance made a contract, though the acceptance was never received. Here, as the parties lived in different towns, it was to be expected that the Plaintiff would post his answer. In *Byrne* v. *Van Tienhoven* (4) a withdrawal was held too late which was not received till after the offer had been accepted, though it was posted before the acceptance; and so in *Stevenson* v. *McLean* (5) it was held that a withdrawal of an offer was of no effect until it reached the other party.

Neville, Q.C., and *P. O. Lawrence*, for the Defendant:—

We submit that the Vice-Chancellor has drawn a correct inference—that there was no authority to accept by post; and if that be so, the acceptance will not date from the posting. *Dunlop* v. *Higgins* (6) went on the ground that it was the understanding of both parties that an answer should be sent by post. In *Brogden* v. *Metropolitan Railway Company*, Lord *Blackburn* puts it on the ground "that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted." It would be very inconvenient to hold the post admissible in all cases. Here, *Liverpool* and *Birkenhead* are at such a short distance from each other, that it cannot be considered that the Plaintiff had an authority to reply by post. If the offer had been sent by post, that would, no doubt, be held to give an authority to reply

(1) 2 Ch. D. 463.
(2) 2 App. Cas. 666, 691.
(3) 4 Ex. D. 216.
(4) 5 C. P. D. 344.
(5) 5 Q. B. D. 346.
(6) 1 H. L. C. 381.

C. A. 1892 HENTHORN v. FRASER.

by post; but the offer was delivered by hand to the Plaintiff, who was in the habit of calling at the Defendants' office, and lived only at a short distance, so that authority to reply by post cannot be inferred. The post is not prohibited; the acceptance may be sent in any way; but, unless sending it by post was authorized, it is inoperative till it is received. Suppose, immediately after posting the acceptance, the Plaintiff had gone to the office and retracted it, surely he would have been free.

[LORD HERSCHELL:—It is not clear that he would, after sending an acceptance in such a way that he could not prevent its reaching the other party. Possibly a case where the question is as to the date from which an acceptance which has been received is operative may not stand on precisely the same footing as one where the question is whether the person making the offer is bound, though the acceptance has never been received at all. More evidence of authority to accept by post may be required in the latter case than in the former.]

Dickinson v. *Dodds* (1) shews that a binding contract to sell to another person may be made while an offer is pending, and that it will be a withdrawal of the offer.

[LORD HERSCHELL:—In that case the person to whom the offer was made knew of the sale before he sent his acceptance.]

Farwell, in reply.

1892. March 26. LORD HERSCHELL:—

This is an action for the specific performance of a contract to sell to the Plaintiff certain house property situate in *Flamank Street, Birkenhead.* The action was tried before the Vice-Chancellor of the County Palatine of *Lancashire*, who gave judgment for the Defendants. On the 7th of July, 1891, the secretary of the building society whom the Defendants represent handed to the Plaintiff, in the office of the society at *Liverpool*, a letter in these terms:—"I hereby give you the refusal of the *Flamank Street* property at £750 for fourteen days." It appears that the Plaintiff had been for some time in negotiation for the property,

(1) 2 Ch. D. 463.

and had on two previous occasions made offers for the purchase of it, which were not accepted by the society. These offers were made by means of letters, written by the secretary in the office of the society, and signed by the Plaintiff there. The Plaintiff resided in *Birkenhead*, and he took away with him to that town the letter of the 7th of July containing the offer of the society. On the 8th of July a letter was posted in *Birkenhead* at 3.50 P.M., written by his solicitor, accepting on his behalf the offer to sell the property at £750. This letter was not received at the Defendants' office until 8.30 P.M., after office hours, the office being closed at 6 o'clock. On the same day a letter was addressed to the Plaintiff by the secretary of the building society in these terms:—"Please take notice that my letter to you of the 7th inst. giving you the option of purchasing the property, *Flamank Street, Birkenhead*, for £750, in fourteen days, is withdrawn and the offer cancelled." This letter was posted in *Liverpool* between 12 and 1 P.M., and was received in *Birkenhead* at 5.30 P.M. It will thus be seen that it was received before the Plaintiff's letter of acceptance had reached *Liverpool*, but after it had been posted. One other fact only need be stated. On the 8th of July the secretary of the building society sold the same premises to Mr. *Miller* for the sum of £760, but the receipt for the deposit paid in respect of the purchase stated that it was subject to being able to withdraw the letter to Mr. *Henthorn* giving him fourteen days' option of purchase.

If the acceptance by the Plaintiff of the Defendants' offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn. This seems to me to be in accordance with the reasoning of the Court of King's Bench in the case of *Adams* v. *Lindsell* (1), which was approved by the Lord Chancellor in *Dunlop* v. *Higgins* (2), and also with the opinion of Lord Justice *Mellish* in *Harris's Case* (3). The

(1) 1 B. & Al. 681. (2) 1 H. L. C. 381, 399.
(3) Law Rep. 7 Ch. 587.

C. A. 1892 HENTHORN v. FRASER. Lord Herschell.

very point was decided in the case of *Byrne* v. *Van Tienhoven* (1) by Lord Justice *Lindley*, and his decision was subsequently followed by Mr. Justice *Lush*. The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the Defendants that the acceptance was complete only when received by them and not on the letter being posted. It cannot, of course, be denied, after the decision in *Dunlop* v. *Higgins* (2) in the House of Lords, that, where an offer has been made through the medium of the post, the contract is complete as soon as the acceptance of the offer is posted, but that decision is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post to *Birkenhead*, but handed to the Plaintiff in the Defendants' office at *Liverpool*. The question therefore arises in what circumstances the acceptance of an offer is to be regarded as complete as soon as it is posted. In the case of the *Household Fire and Carriage Accident Insurance Company* v. *Grant* (3), Lord Justice *Baggallay* said (4): "I think that the principle established in *Dunlop* v. *Higgins* is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." And in the same case Lord Justice *Thesiger* based his judgment (5) on the defendant having made an application for shares under circumstances "from which it must be implied that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post." The facts of that case were that the defendant had, in *Swansea*, where he resided, handed a letter of application to an agent of the company, their place of business being situate in *London*. It was from these circumstances that the Lords Justices implied an authority to the company to

(1) 5 C. P. D. 344.
(2) 1 H. L. C. 381.
(3) 4 Ex. D. 216.
(4) Ibid. 227.
(5) 4 Ex. D. 218.

C. A. 1892 HENTHORN v. FRASER. Lord Herschell.

accept the defendant's offer to take shares through the medium of the post. Applying the law thus laid down by the Court of Appeal, I think in the present case an authority to accept by post must be implied. Although the Plaintiff received the offer at the Defendants' office in *Liverpool*, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post. I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the Post Office no less than any other. The only effect of the supposed authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted. It matters not in which way the proposition be stated, the present case is in either view within it. The learned Vice-Chancellor appears to have based his decision to some extent on the fact that before the acceptance was posted the Defendants had sold the property to another person. The case of *Dickinson* v. *Dodds* (1) was relied upon in support of that defence. In that case, however, the plaintiff knew of the subsequent sale before he accepted the offer, which, in my judgment, distinguishes it entirely from the

(1) 2 Ch. D. 463.

C. A. 1892 HENTHORN v. FRASER.

present case. For the reasons I have given, I think the judgment must be reversed and the usual decree for specific performance made. The Respondents must pay the costs of the appeal and of the action.

LINDLEY, L.J. :—

I quite concur. I am not prepared to accede to the argument that because the offer was not made by post there was no authority to send an acceptance by post, and the Vice-Chancellor, in my opinion, fell into a mistake by acceding to it.

KAY, L.J. :—

On the 7th of July, 1891, the Defendants gave to the Plaintiff, who was then in their office in *Liverpool*, an offer in writing to sell him certain real property at *Birkenhead*, where the Plaintiff resided. The Plaintiff had been on several previous occasions at their office on this or like business. He was not able to write beyond signing his name. On the 8th of July his solicitor wrote by his direction accepting the offer. This letter was posted at 3.50 P.M., and arrived at 8.30 the same evening. This was after office hours, and it was not opened till 10 o'clock next morning. In the meantime the Defendants wrote withdrawing their offer on the same 8th of July, and posted their letter between 12 and 1 P.M. This was received at 5.30 the same evening. On the same 8th of July the Defendants entered into a contract to sell the same property to another person with an express condition if they were able to withdraw their offer to the Plaintiff.

The question is, was the withdrawal in time or too late.

Dunlop v. *Higgins* (1) has decided that, where a letter sent by post was a proper mode of acceptance, the contract was complete from the time that the letter was posted. In that case the letter was actually received, though, by fault of the Post Office, there was some delay in its transmission. Upon receipt of it, the offer was withdrawn. The question was the same as in the present case, except that the withdrawal was after the actual

(1) 1 H. L. C. 381.

receipt of the acceptance which was treated as being too late. It was held that, by posting the letter in due time, the party by the usage of trade had done all that he was bound to do. He could not be responsible for the delay of the Post Office in delivering the letter, and therefore there was from the time of the posting a valid acceptance. It might have still been doubtful whether posting a letter of acceptance in time would amount to an acceptance if the letter was never received. The ordinary rule is, that to constitute a contract there must be an offer, an acceptance, and a communication of that acceptance to the person making the offer: per Lord *Blackburn* in *Brogden* v. *Metropolitan Railway Company* (1); and see *per* Lord *Bramwell* (2). It may be that where the communication is in fact received, the contract may date back to the time of posting the acceptance, but there is considerable reason for holding that if never received the posting might be treated as a nullity. The point was so decided in *British and American Telegraph Company* v. *Colson* (3); and see the judgment of Lord *Bramwell* in *Household Fire and Carriage Accident Insurance Company* v. *Grant*. However, in the last-mentioned case, which is a decision binding upon this Court, the Court of Appeal, *Bramwell*, L.J., dissenting, held, that the posting of a letter of allotment in answer to an application for shares constituted a binding contract to take the shares though the letter of allotment was not received. In his judgment, *Thesiger*, L.J., refers to the cases in which the decision in *Dunlop* v. *Higgins* (4) has been explained by saying that the Post Office was treated as the common agent of both contracting parties. That reason is not satisfactory. The Post Office are only carriers between them. They are agents to convey the communication, not to receive it. The communication is not made to the Post Office, but by their agency as carriers. The difference is between saying "Tell my agent *A.*, if you accept," and "Send your answer to me by *A.*" In the former case *A.* is to be the intelligent recipient of the acceptance, in the latter he is only to convey the communication to the person making the offer which he may do by a letter, knowing

(1) 2 App. Cas. 692.
(2) 4 Ex. D. 233.
(3) Law Rep. 6 Ex. 108.
(4) 1 H. L. C. 381.

C. A. 1892 HENTHORN v. FRASER. Kay, L.J.

nothing of its contents. The Post Office are only agents in the latter sense. All that *Dunlop* v. *Higgins* (1) decided was, that the acceptor of the offer having properly posted his acceptance, was not responsible for the delay of the Post Office in delivering it; so that after receipt the said party could not rescind on the ground of that delay. I cannot help thinking that the decision has been treated as going much further than the House of Lords intended. *Baggallay*, L.J., in his judgment in *Household Fire and Carriage Accident Insurance Company* v. *Grant* (2), treats it as applicable "to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." If for authorized the word "contemplated" is substituted, I should be disposed to agree with this dictum. But I would rather express it thus: "Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post."

Is that a proper inference in the present case? I think it is. One party resided in *Liverpool*, the other in *Birkenhead*. The acceptance would be expected to be in writing, the subject of purchase being real estate. These and the other circumstances to which I have alluded, in my opinion, warrant the inference that both parties contemplated that a letter sent by post was a mode by which the acceptance might be communicated. I think, therefore, that we are bound by authority to hold that the contract was complete at 3.50 P.M. on the 8th of July, when the letter of acceptance was posted, and before the letter of withdrawal was received.

Then what was the effect of the withdrawal by the letter posted between 12 and 1 the same day, and received in the evening? Did that take effect from the time of posting? It has never been held that this doctrine applies to a letter withdrawing the offer. Take the cases alluded to by Lord *Bramwell* in the *Household Fire and Carriage Accident Insurance Company* v. *Grant* (3). A notice by a tenant to quit can have no operation

(1) 1 H. L. C. 381. (2) 4 Ex. D. 227. (3) 4 Ex. D. 234.

till it comes to the actual knowledge of the person to whom it is addressed. An offer to sell is nothing until it is actually received. No doubt there is the seeming anomaly pointed out by Lord *Bramwell* that the same letter might contain an acceptance, and also such a notice or offer as to other property, and that when posted it would be effectual as to the acceptance, and not as to the notice or offer. But the anomaly, if it be one, arises from the different nature of the two communications. As to the acceptance, if it was contemplated that it might be sent by post, the acceptor, in Lord *Cottenham's* language, has done all that he was bound to do by posting the letter, but this cannot be said as to the notice of withdrawal. That was not a contemplated proceeding. The person withdrawing was bound to bring his change of purpose to the knowledge of the said party, and as this was not done in this case till after the letter of acceptance was posted, I am of opinion that it was too late.

The point has been so decided in two cases: *Byrne* v. *Van Tienhoven* (1), and *Stevenson* v. *McLean* (2), and I agree with those decisions.

Solicitors: *G. Dalby, Birkenhead; Miller & Williamson, Liverpool.*

(1) 5 C. P. D. 344. (2) 5 Q. B. D. 346.

H. C. J.

CHITTY, J.
1892
Feb. 3, 6;
March 16.

In re BURTON'S WILL.
BANKS *v.* HEAVEN.

[1891 B. 3162.]

Infant—Maintenance—Contingent Interest — Intermediate Income — Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

A testator specifically devised scheduled property "whether real or personal" to trustees, upon trust for his daughter for life, and after her decease for her children—sons at twenty-one, daughters at that age or marriage; he then devised and bequeathed his residuary real and personal estate, after deducting the scheduled property, to his said trustees to be held by them, as to a moiety thereof, upon the trusts thereinbefore declared of and concerning the specifically devised freeholds. The scheduled property, in fact, comprised freeholds only. The daughter died leaving two infant children:—

Held, that the rule in *Genery* v. *Fitzgerald* (1) applied under the special terms of this will both to the scheduled and residuary gifts, and that the infants were contingently entitled, on attaining twenty-one or marriage, to the income, since their mother's death, of the specifically devised freeholds, and of one moiety of the residuary estate; and, consequently, that sect. 43 of the *Conveyancing and Law of Property Act*, 1881, applied, and that the trustees had power to resort to the intermediate income for maintenance.

Conclusion of *North*, J., in *In re Jeffery* (2), as to the whole of the income in that case going to the child who first attained twenty-one "to the exclusion of the others," dissented from.

Furneaux v. *Rucker* (3), explained.

Adjourned summons.

Keighley Burton, the testator, who died in June, 1879, by his will, after giving certain pecuniary and specific legacies, devised and bequeathed to his trustees, first, all his estate and interest in the lands, hereditaments, and other property, "whether real or personal," whereof the particulars were set forth in the first schedule at the end of his said will; and secondly, all his estate and interest in the lands and hereditaments, and other property, "whether real or personal," whereof the particulars were set forth in the second schedule, upon trust to hold the

(1) Jac. 468. (2) [1891] 1 Ch. 675.
(3) W. N. (1879) 135.

first share (that is, the property comprised in the first schedule) in trust for his son *James Keighley Burton* for life, and "from and after" his decease for his issue as he should appoint, and in default, for the children of his son who, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age or marry. And he declared that the trustees should hold the second share (that is, the property comprised in the second schedule) upon the like trusts and subject to the like powers in favour of his daughter *Margaret Burton* and her children and issue, as were thereinbefore declared concerning the first share in favour of his son and his children and issue. The testator then proceeded to create cross limitations by way of trust of these shares, the effect of which may be shortly stated as follows: If there should be no children or issue of his son as aforesaid, then, in case his daughter survived his son, the first share was to be held upon the trusts of the second share; but if his daughter should die before his son, then the first share and the second share, if under the trusts therein contained the same should become subject to the trusts declared concerning the first share, should be held in trust as the son should by deed or will appoint; and in default, upon trust for the son, "his heirs, executors, administrators, and assigns respectively." The testator further declared that if there should be no child or issue of his daughter as aforesaid, then, in case his son should survive his daughter, the second share was to be held upon the trusts of the first share; but if his son should die before his daughter, then the second share and the first share, if under the trusts therein contained the same should become subject to the trusts declared concerning the second share, should be held in trust as the daughter should by deed or will appoint; and in default, upon trust for the daughter, "her heirs, executors, administrators, and assigns respectively." The testator then continued: "And as to all the rest and residue of my real and personal estate whatsoever and wheresoever, after deducting thereout all and every the property mentioned in the first and second schedules, and also such legacies and devises as are hereinbefore contained, and after payment thereout of all my just debts, funeral and testamentary expenses, and the costs, charges, and expenses of

CHITTY, J. 1892 *In re* BURTON'S WILL. BANES *v.* HEAVEN.

proving and carrying into effect the trusts of this my will, I give and devise the same to my trustees, to be held by them as to one equal moiety thereof, upon the trusts hereinbefore declared of and concerning the first share, and as to the other moiety upon the trusts hereinbefore declared of and concerning the second share."

The will contained no provisions as to maintenance. The whole of the property comprised in the schedules consisted of real estate only; the first schedule containing a specific description of some 198 acres, and the second schedule containing a similar description of some 197 acres. The testator left a considerable amount of personal estate.

The testator's daughter, *Margaret Burton*, married the defendant *George Henry Heaven* in March, 1881, and died in November, 1890, leaving two children, a son and a daughter.

The trustees took out a summons for the determination of certain questions arising in the administrations of the estate, one of which—a contention by the son, as heir-at-law, that the infants took legal contingent remainders in the freeholds included in the second schedule—calls for no further notice except to state that the Court decided that the legal estate was devised to and was still vested in the trustees; another question raised, and the only one requiring a detailed report, was, whether the infants were entitled to maintenance out of any part of the income of the trust estate under sect. 43, sub-sect. 1, of the *Conveyancing Act*, 1881.

Hood, for the trustees.

Stokes, for the infants:—

I ask for a declaration which will enable the trustees to apply some part of the intermediate income of the trust estate devised to their mother for the maintenance of these infants. This is clearly "property held by trustees in trust for an infant contingently on his attaining twenty-one years" within the meaning of sect. 43, sub-sect 1, of the *Conveyancing Act*. This case is not one within the principle of *In re Dickson* (1). The only

(1) 29 Ch. D. 331.

authority which seems to be against me is *In re Jeffery* (1); but that is distinguishable on the ground that it was a gift to the children of three persons who were alive. This case is within the decision of *In re Medlock* (2). There is no "contrary intention" expressed in the will under which the interest of these infants arises: they are contingently entitled to the intermediate rents of the freeholds and the intermediate income of the residuary estate.

R. F. Norton, for the testator's son, who was his heir-at-law and next of kin:—

The devise of the freeholds does not carry the intermediate income to these infants, even if they attain a vested interest; and this income being undisposed of, in the event which has happened, goes to the heir-at-law; therefore no maintenance can be given out of that. As to the intermediate income arising from a moiety of the residuary estate, that is also undisposed of, and goes to the next of kin; but if it is disposed of, then, according to *In re Jeffery*, is not available for maintenance.

Stokes, in reply:—

In re Jeffery is not correct. The cases relied on by Mr. Justice *North*, such as *Shepherd* v. *Ingram* (3), *Mills* v. *Norris* (4), and *Scott* v. *Earl of Scarborough* (5), do not, when examined, warrant the proposition (6) that the income "belongs to such of the grandchildren as had attained twenty-one at the time the income accrues, to the exclusion of the others." *Brandon* v. *Aston* (7) is inconsistent with these three cases, and it is a later decision; so, too, is *Rochford* v. *Hackman* (8). *Furneaux* v. *Rucker* (9), which was also relied on by Mr. Justice *North* in *In re Jeffery*, appears from *Wolstenholme* on the *Conveyancing Act* (10) to have been a specific bequest of leaseholds. [*Lewin* on Trusts (11) was also referred to.]

(1) [1891] 1 Ch. 671.
(2) 55 L. J. (Ch.) 738.
(3) Amb. 448.
(4) 5 Ves. 335.
(5) 1 Beav. 154.
(6) [1891] 1 Ch. 675.
(7) 2 Y. & C. Ch. 24, 30.
(8) 9 Hare, 475.
(9) W. N. (1879) 135.
(10) 6th Ed. p. 102.
(11) 9th Ed. p. 656.

CHITTY, J.
1892
In re BURTON'S WILL. BANKS *v.* HEAVEN.

1892. March 16. CHITTY, J. (after stating the question raised for his decision, continued) :—

The trust property to which the question relates consists, first, of the property comprised in the second schedule to the will; and secondly, of one moiety of the residuary estate. Unquestionably, these properties are now held in trust, contingently as to the infant grandson of the testator on his attaining the age of twenty-one years, and as to the infant granddaughter on her attaining that age or marrying. It would seem, therefore, *primâ facie*, that the case falls within sub-sect. 1 of sect. 43 of the *Conveyancing Act*, 1881; but the case cannot be thus summarily disposed of. Having regard to the other sub-sections of sect. 43, and to the authorities bearing on that section, it is necessary to ascertain the testator's intention as to the income in question, and for that purpose to examine his will with care. [His Lordship having stated the will as above till he came to the gift of residue, continued :—]

The effect of the will, therefore, so far is plain. Subject only to the question whether the intermediate income arising after the death of the tenant for life, and before the vesting of his or her children's shares is disposed of, there is a complete and exhaustive disposition of the whole of the testator's interest in the properties comprised in the schedules. If either the son or the daughter survived the testator, the disposition is complete, subject only to the above question.

Then there is the residuary gift, which is peculiarly framed. [His Lordship read it, observing that the trusts were clearly sufficient to incorporate the cross limitations in the earlier part of the will; and having stated the facts as to there being personal estate, and as to the daughter's death as above, continued :—]

The claim of the infants for maintenance is opposed by the son. The argument for him stands thus: The property comprised in the second schedule being real estate only, and the trust in favour of the daughter's children being merely a future contingent limitation, the trust does not carry the income to the children before the contingency occurs, nor will it carry to them, or either of them, the intermediate income, if the contingency happens, and they, or either of them, in the event take or takes

a vested interest. The argument for the testator's son depends then on the proposition of law that a future devise of lands does not carry the intermediate rents, and on the corresponding proposition in equity that this rule of law is followed, although the fee simple is vested in trustees, as I have already decided, is the case here. Consequently, it is argued that the intermediate income of the testator's daughter's scheduled share is not disposed of by the trusts declared of the specific devise. Being, therefore, undisposed of, this income, it is said, either falls into the residue, or if the residuary gift, from its peculiar form, is not so framed as to catch it, it slips through the will, and results to the heir under an intestacy. If it falls into residue, then one-half of it goes as part of the residue to the first share, of which the testator's son is now tenant for life. I stay here to state my opinion, that if it falls into residue it goes as income and not as capital. But what becomes, according to this argument, of the other moiety of this income? Following out the argument with strict logical accuracy, it would go under the trusts declared of the residue as part of the residue to the second share, of which the testator's daughter was first tenant for life. But the trusts declared of the residue are by reference only; and working back through the will to the trusts of the second share, which in turn are declared by reference to the trusts of the first share, the result would be that this half of the income would not be caught by the residuary trusts declared of the second share, but would pass under an intestacy. For although the residuary gift comprises personal estate, and the rule in *Genery* v. *Fitzgerald* (1) would, *primâ facie*, apply; yet, in conformity with this argument, the rule would be displaced by the express trust that the second moiety of the residue is to be held upon the trusts thereinbefore declared concerning the second scheduled share. And similar reasoning would apply to the second moiety of the residue, whether it did or did not include the intermediate income of the second scheduled share.

The conclusion thus arrived at would certainly startle the testator. It certainly was not contemplated by him; and I think that it is not justified by the will. In my opinion, the rule in

(1) Jac. 468.

CHITTY, J. 1892 *In re* BURTON'S WILL. BANKS *v.* HEAVEN.

Genery v. *Fitzgerald* (1) applies throughout the will. The rule is, that if realty and personalty are blended in a future residuary gift, though the realty may not be directed to be sold, so as to create a mixed fund, the intermediate profits will pass. The rule was applied, and, as I think, rightly, by Mr. Justice *Pearson* in *In re Dumble* (2), where the realty and personalty were not blended together, but were given in separate clauses, the trusts declared being substantially identical. The rule is founded on intention. Where in the same gift the testator includes realty and personalty, the intention is taken to be that the income as a whole shall follow the destination of the income of the personalty and not of the realty. Why? Because the doctrine as to realty, founded as it is on feudal principles, is considered to be technical and artificial, and the mere blending of realty and personalty together is considered to be sufficient ground for excluding it.

Now, on this will it is clear that the testator intended that the scheduled shares, and the moieties of residue, should respectively go the same way. As to the second moiety of the residuary estate, I see no difficulty in following the testator's language. That moiety, including as it does personalty, is to go as well as to capital as to income in the same manner as the capital and income of personalty goes. That income is now held by the trustees contingently for the infants. Such being the true and substantial result of the residuary trusts, the form of the trusts is not sufficient to exclude the rule in *Genery* v. *Fitzgerald.* The residuary trusts may be legitimately made use of on this will for the purpose of explaining and throwing light on the trusts of the scheduled shares. Throughout his will the testator never once mentions income. In the devise of the property comprised in the schedules the testator speaks of it "as property whether real or personal." Although no personal property was in fact included in either of the schedules at the testator's death the testator considered that personalty was, or might be included, in both or one of the schedules. This description of the property is not immaterial on the question of his intention. In *Genery* v. *Fitzgerald,* Lord *Eldon* says (3): "Here the property

(1) Jac. 468. (2) 23 Ch. D. 360.

(3) Jac. 470.

was partly real, partly personal, and partly of such a description that the testator does not seem to have known whether it was real or personal." The mixing up of realty and personalty in the same gift shews an intention that the same rule should operate as to both. Lord *Eldon* was dealing with a case where no trust was created, but where there was a legal devise and bequest of the whole together. Further, the trust for the issue is to arise "from and after" the death of the tenant for life. The testator does not contemplate any gap. It is not necessary to say what would be the effect of these parts of the will standing alone. The question as to the intermediate income of the second scheduled share does not depend solely on the description or the trusts of the scheduled property, or the referential trusts in the residuary gift. In the gift of the residue of his real and personal estate, the testator expressly "deducts thereout all and every the property mentioned in the first and second schedules." He then excludes the scheduled properties from the operation of the residuary gift. He excludes them because he considers that he has already made a complete and exhaustive disposition of them, and he knows that he is about to declare trusts of the moieties of his residuary estate, for the benefit of his son and daughter and their issue, which merely repeat, by reference, the trusts already declared of the scheduled properties themselves. Putting the various parts of this will together, there is, in my opinion, sufficient to justify me in holding, as I do, that the infants are contingently entitled, as to the son on his attaining the age of twenty-one years, and as to the daughter on her attaining that age or marrying, to the income, since their mother's death, of the property comprised in the second schedule, and of one moiety of the residuary estate.

Such being the construction of the will, it follows, consistently with the principles laid down by the Court of Appeal in *In re Dickson* (1), that the 43rd section of the *Conveyancing Act*, 1881, applies, and the trustees have a power of applying the income for maintenance.

As between the infants, I think that, consistently with the rule in *Genery* v. *Fitzgerald* (2), the infant who first attains a vested

(1) 29 Ch. D. 331.

(2) Jac. 468.

CHITTY, J. 1892 *In re* BURTON'S WILL. BANES *v.* HEAVEN.

interest will not thenceforward be entitled, while the other infant is alive, to the whole of the income of the realty. The case is, therefore, on this point distinguishable from the decision in *In re Jeffery* (1), and it is consequently unnecessary that I should consider that case; but, with deference, I am bound to say, that as at present advised, I am unable to concur in that part of the decision which relates to the whole of the income going to the grandchild who first attains twenty-one (2). I may add that I have been furnished with a copy of the order in *Furneaux* v. *Rucker* (3), from which it appears that the property in that case was leasehold.

Solicitors: *T. L. Taylor; Dod, Longstaffe, Son, & Fenwick; Ridsdale & Son*, agents for *J. K. Burton, Selby.*

(1) [1891] 1 Ch. 671. (2) [1891] 1 Ch. 675.
(3) W. N. (1879) 135.

W. C. D.

MORRIS *v.* TOTTENHAM AND FOREST GATE RAILWAY COMPANY.

NORTH, J.
1892
Jan. 29.

[1892 M. 37.]

Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 32 [*Revised Ed. Statutes, vol. ix., p.* 714]—*Power to take Temporary Possession of Land—Necessary Purpose—"Road"—Railroad.*

The authority given by sect. 32 of the *Railways Clauses Consolidation Act*, 1845, to take temporary possession of land for the purpose of forming roads does not include taking for the purpose of forming a railroad. Land can only be so taken when the taking is necessary, and mere saving of expense does not constitute necessity.

THIS was a motion on the part of the Plaintiffs for an interlocutory injunction in terms of the writ, viz., to restrain the Defendants, the *Tottenham and Forest Gate Railway Company*, from proceeding on a notice to take temporary possession, under sect. 32 of the *Railway Clauses Consolidation Act*, 1845, of land of which the Plaintiffs were lessees in possession. The notice was dated the 28th of December, 1891, and was to take temporary possession of the land in question "for the purpose of forming roads thereon to or from or by the side of the proposed railway during the construction of the railway."

The Defendants' railway in course of construction crossed the main line of the *Great Eastern Railway* nearly at right angles, a short distance from the *Leytonstone* station. The Plaintiffs' land adjoined the main line. The land comprised in the notice in question was intended to be used for the construction of a branch, in the form of a quadrant of a circle, to connect the main line with the new line, for the purpose of bringing materials from places at some distance away to be used in the construction of the new railway. A small part of it had been made, and a photograph in evidence shewed that it was laid with sleepers and rails, exactly like those on the main line. The following is an extract from an affidavit filed on behalf of the Defendants:—

"It is undoubtedly the intention of the company and their contractors to use such land for the purpose of making a

NORTH, J. 1892 MORRIS v. TOTTENHAM AND FOREST GATE RAILWAY COMPANY.

temporary road thereon from the siding of the *Great Eastern Railway's* aforesaid goods station to the railway which the company are constructing, and no doubt materials for the construction of such railway will be carried in waggons or trucks from the said siding to the land on which such railway is being constructed, and in all probability, as is almost invariably the case when a railway is being constructed, rails will be laid on the road when formed for such waggons or trucks to run on, and in all probability the materials so brought on to the company's property on which the railway is being constructed will be utilized not only for the purposes of such railway so far as it is near the land comprised in the said notice, but also on other parts of the site of the company's intended railway lying towards *Forest Gate.*"

Cozens-Hardy, Q.C., and *Dibdin*, for the Plaintiffs:—

The notice to take is bad, because it does not sufficiently indicate the object for which the land is required.

Secondly. The object of taking temporary possession of the land is not for the construction of "that portion of the railway" within the meaning of sect. 32 only, for it is intended to use the material conveyed over it for a considerable portion of the railway more or less distant from the land.

Thirdly. The section does not authorize the taking land for a railroad. The distinction between a road and railroad is drawn in the Act; in sect. 16 they are distinguished. If a railroad were intended to be included in this section, the word "railroad" would have been added.

Fourthly. The company before they can exercise the extraordinary powers given by the section must shew that it is necessary to do so; it is not sufficient that it is convenient or will save expense to do so: *Pugh* v. *Golden Valley Railway Company* (1); *Fenwick* v. *East London Railway Company* (2); still less that it will save the contractors' expense.

If there is any doubt as to the construction of the Act, it will be construed against the company: *Simpson* v. *South Staffordshire Waterworks Company* (3).

(1) 12 Ch. D. 274; 15 Ch. D. 330. (2) Law Rep. 20 Eq. 544.
(3) 4 D. J. & S. 679.

S. Hall, Q.C., and *R. J. Parker*, for the Defendants:—

The notice expresses that the purpose for which the land is required is for a road; if that includes (as we contend it does) a railroad the notice is sufficient.

The words "that portion of the railway" are sufficient to include the section commenced to be constructed from the land in question.

It is practically necessary to have this means of bringing material. We submit that there need be no absolute necessity. The real question on this point is whether it is on the whole fitting that the land should be used for the purpose required.

This section is different from sect. 16. The powers given by sect. 16 are of a higher and more overbearing character than those given by sects. 30 and 32: *Rangeley* v. *Midland Railway Company* (1), and this is shewn by the language of the set of sections relating to the taking of land temporarily, especially sects. 30 and 35. It may well be that where a company is authorized to divert a road, they are not authorized to divert a railroad. But a road is not the less a road because rails are laid on it, and authority to make a road includes authority to make a rail- or tramway: *Dand* v. *Kingscote* (2).

Cozens-Hardy, in reply.

NORTH, J. (after saying that he would treat the notice to take the land as sufficient in its terms, and that on the evidence the Defendants proposed to make what was really a branch railroad on the land, continued):—

That being so, the owners of the land apply for an injunction, and in my opinion they are entitled to restrain the trespass which the company propose to commit, if it be a trespass.

The answer of the company is that they are justified in doing what they do under the Act, and that really is the question. Does the 32nd section justify their entering upon and using the Plaintiffs' land to build a railway upon for the purpose of connecting for temporary purposes the main line of the *Great Eastern Railway* with a new railway which crosses it at right angles?

(1) Law Rep. 3 Ch. 306. (2) 6 M. & W. 174.

BIBL. LONDIN

NORTH, J.
1892
MORRIS
v.
TOTTENHAM AND FOREST GATE RAILWAY COMPANY.

Now, the 32nd section prescribes—to read it shortly—that the company may within the period for completing the line, without any payment or deposit, enter upon any lands within the limits—within which it is admitted that the present lands are—and to occupy the same so long as may be necessary for the construction or repair of that portion of the railway or of the accommodation works connected therewith hereinafter mentioned, and to use the same for any of the following purposes.

Now, no one has suggested to me any reasonable construction of the phrase "that portion of the railway," and I do not know what it means. It does not refer to anything defined elsewhere in the Act in any way.

The company having entered upon the land may occupy the said lands so long as may be necessary for the construction or repair of that portion of the railway or of the accommodation works connected therewith hereinafter mentioned, and use the same for any of the following purposes. Then comes this: "For the purpose of taking earth or soil by side cuttings therefrom." This branch is not intended for that. Then I will read the third next: "For the purpose of obtaining materials therefrom for the construction or repair of the railway or such accommodation works as aforesaid." That seems to be very much *in pari materia* with the first. Both are as to taking materials from the land in question. Then I will go to the second: "For the purpose of depositing spoil thereon." That is not taking anything away from the land, but putting something upon it which is not there by nature; and as regards that, it appears to me if spoil is deposited thereon that is not a temporary deposit of spoil; it may be a permanent deposit. All those matters relate, therefore, to materials in connection with the land itself. It is either taking materials from the land or putting materials upon the land. Then we come to this: "For the purpose of forming roads thereon to or from or by the side of the railway." Now, although the previous words have dealt very fully with the taking of materials from and putting materials upon the land, there is no reference in terms to materials coming from any other place, except the land that is to be occupied; and the only question is whether those last words "forming roads" authorize the doing of what is proposed

to get materials from or placed upon, not the land in question, but other land more or less contiguous. I do not think that such a railway as is proposed in the present case is a road within the meaning of the words as used here. That is my strong impression.

But there is a second point also, and upon that I am against the company. The decisions which have been given upon the Act shew that the 16th section and the 32nd section apply to cases in which what is proposed to be done is necessary for the purposes of the railway, not merely by reason of the language used in those two sections themselves, but on the ground of the general intendment of the Act and the Legislature in passing the Act with reference to powers given to persons who propose to take away from owners temporarily or permanently the possession or enjoyment of land to which those owners are entitled; and, further than that, the Act is to be construed as pointed out in *Simpson* v. *South Staffordshire Waterworks Company* (1). If there is any doubt with regard to the extent of the powers claimed under the Act, it should be construed for the benefit of the landowner, and not in such a manner as to give to the company any power which is not most clearly and expressly defined in the Statute. That being so, it is for the company to make out their case clearly, and to satisfy me on the reasonable construction of the Act that their view of it is right. They have not satisfied me upon that point, having regard particularly to the cases that have been cited. Those cases seem to me to shew that what is required for justifying the proceedings of the company is that the work is necessary for the construction of the railway; and, without saying what is necessary, the decisions shew that a mere saving of expense to the company, and *à fortiori* a mere saving of expense to the contractors for the company, is not a necessary purpose within the meaning of the Act.

Then it is said that such a construction, although it may be essential and binding as to the 16th section, is not essential as to sect. 32. I think it was pointed out in *Fenwick* v. *East London Railway Company* (2) (which was a case relating to the 32nd section, and not to the 16th section; but I do not think that

(1) 4 D. J. & S. 679. (2) Law Rep. 20 Eq. 544.

NORTH, J.
1892
MORRIS
v.
TOTTENHAM AND FOREST GATE RAILWAY COMPANY.

there is any distinction between the two) that the decision was based rather upon the general intendment of the Act than upon the particular wording of the section; a purpose which covers all the sections contained in it, except so far as there is anything in the Act to distinguish them.

Then it is said that the phrases used in both the 31st section and the 35th section of the Act shew that, with regard to taking under the 30th section or the 32nd section of the Act, it is not essential that the works should be necessary; it is sufficient that they should be convenient. The argument upon those sections does not convince me. The question whether it is more fitting that one piece of land or another should be taken for a purpose for which the company are authorized to use either of them may well arise as between two different pieces of land and their respective owners, while it is strictly and essentially necessary for the purposes of the company that one or other of those two pieces of land should be so used by them. The 31st and 35th sections will apply to such case, and they have their full meaning given to them by applying them to cases in which it is necessary for the company to get the use of the land from one person or another without its being essential to get it from one rather than the other of them, although the question may still be open whether it is more fit as between the two that they should take from one or the other.

Under these circumstances, I come to the conclusion as regards the 32nd section that the taking of this land is not shewn to be necessary, having regard to the decisions on the Act.

That being so, I must grant the injunction.

Solicitors for the Plaintiffs: *Vincent & Vincent.*
Solicitors for the Defendants: *F. C. Mathews & Browne.*

D. P.

LAYBOURN *v.* GRIDLEY.

NORTH, J.
1892
March 16.

[1890 L. 1072.]

Vendor and Purchaser—Parcels—Overhanging Building.

A portion of premises as occupied overhung adjoining premises. The owner in fee of both premises demised them as occupied to separate persons. He subsequently conveyed the overhung premises by reference to a ground-floor plan, subject to the lease of those premises, but not expressly subject to the lease of the overhanging premises:—

Held, that the overhanging part of the adjoining premises passed by the conveyance.

The ownership of a building partly overhanging other premises does not give the owner a right to raise the overhanging part of his building.

THE Plaintiff was the owner in fee (subject to a lease for thirty-five years from December, 1867) of a public-house and premises known as the *Outrigger*, at *Kingston-on-Thames*. The Plaintiff's premises were situated at the corner of the towing-path and *Water Lane, Kingston*, fronting on the north *Water Lane*, and on the west the towing-path. The Defendants, *James Gridley* and *Frederick Gridley*, were the occupiers of timber premises on the east side of the *Outrigger*, also fronting *Water Lane*. The Defendant *James Gridley* was the owner in fee of the timber premises. He was also equitable owner of a lease of the same premises for twenty-one years from the 29th of September, 1870.

A small part of a loft, the greater part of which was over a part of the Defendants' premises, extended over a part of the Plaintiff's premises. The action related to the ownership of that part of the loft. The whole loft was occupied by the Defendants as of right down to the 29th of September, 1891.

Thomas Cucksey, the elder, was in 1867, and down to the time of his death, owner in fee of the Plaintiff's premises, the Defendants' premises, and other property adjoining. By an indenture, dated the 28th of December, 1867, *Thomas Cucksey*, the elder, demised the *Outrigger* to *Jane Gurney* for a term of thirty-five years from the 25th of December, 1867, reserving a right of way across a yard to the Defendants' premises. The premises demised

NORTH, J. 1892 LAYBOURN v. GRIDLEY.

were described as "all that messuage or tenement, with the outbuildings, ground, and premises as the same is situate near to the riverside in *Kingston-upon-Thames* aforesaid, and as the same premises were late in the occupation of *Charles Melsom*, and are now in the occupation of *Jewett*, and used as a beerhouse and called the *Outrigger*." By an indenture dated the 27th of August, 1870, *Thomas Cucksey*, the elder, demised the Defendants' premises to the Defendant *James Gridley*, for a term of twenty-one years from the 29th of September, 1870, by the description, "all that warehouse, yard, and outbuildings thereto belonging, situate adjoining the *Outrigger* public-house, and abutting on *Water Lane*, *Thames* side, in *Kingston-on-Thames*, late in the occupation of Messrs. *Priest & Woolnough*, since of *Eastling*, and now of the said *James Gridley*," together with a right of way over the open yard, part of the *Outrigger* premises.

In June, 1871, *Thomas Cucksey*, the heir of *Thomas Cucksey*, the elder, put up for sale his property at *Water Lane, Kingston*, in six lots. The Plaintiff's premises formed lot 2, the Defendants' lot 3. The premises were described in the particulars of sale by reference to a plan which shewed the ground-floor rooms and other divisions on the ground floor. Lot 2 was described in the particulars as "coloured green on plan, a freehold licensed public-house known as the *Outrigger*, adjoining lot 1, and occupying an excellent position at the corner of *Water Lane, Kingston-on-Thames*, having a total frontage of about eighty-five feet, and covering an area of 3126 square feet. The premises are conveniently arranged and in good repair; they are to let on lease for a term of thirty-five years from Christmas, 1867, at the nominal rent of £25 per annum. The vendor's father reserved to himself and his assigns in the above lease a right of way to the premises now forming lot 3."

The Plaintiff purchased lot 2 at the sale; lots 1 and 3 were not then sold. The *Outrigger* was conveyed to the Plaintiff by deed dated the 23rd of February, 1872. The conveyance recited the lease of December, 1867; the parcels conveyed were described as "all that piece or parcel of ground situate, lying, and being at *Kingston-upon-Thames*, in the county of *Surrey*, at or near the great bridge there, together with the messuage or tenements

and outbuildings and premises thereon erected, formerly in the occupation of *Charles Melsom*, but now of *Jewitt*, and as a beer-house, and called or known by the name of the *Outrigger*, and which said hereditaments and premises, with the dimensions, abuttals, and boundaries thereof, are more particularly delineated in the map or plan drawn on these presents and thereon coloured green."

The plan was a copy of that part of the plan annexed to the particulars of sale which referred to lot 2. By the habendum the premises were expressed to be subject to the lease of the 28th of December, 1867, and the right of way thereby reserved to the Defendants' premises.

The Defendants' premises were described in the particulars of sale as "lot 3, coloured pink on plan, all those freehold timber-yard and premises situate in *Water Lane, Kingston-on-Thames*, having a frontage thereto of about seventy-one feet, and occupying a total area of about 4035 square feet. Those capital premises are let on lease to Mr. *Gridley*, timber merchant, for a term of twenty-one years from the 29th of September, 1870, at the very low rent of £28 per annum. In such lease is reserved a right of way for the lessees, their servants, agents, and workmen, through or over the yard of lot 2, as in such lease appears."

Lot 3 was not sold at the auction. It was subsequently purchased, together with lot 1, by *Henry Heerick*, and both lots were conveyed to him by indenture dated the 28th of March, 1872.

The part of the premises comprised in lot 3 were described in the conveyance as "and, secondly, all that freehold warehouse, timber-yard, and premises situate in *Water Lane, Kingston-on-Thames*, bounded on the west by messuages and premises known as the *Outrigger*, on the south by premises now belonging to the said *M. Lucas*, on the east by other premises belonging to the said *Henry Heerick*, and on the north by *Water Lane*, which premises are more particularly described and delineated with the abuttals thereof on the plan drawn on the second skin of this indenture, and therein coloured pink," with usual general words, including all appurtenances, and the conveyance was expressed to be subject to the lease to *James Gridley*.

NORTH, J.
1892
LAYBOURN
v.
GRIDLEY.

In the year 1875, the Defendant *James Gridley* purchased the timber premises from *Henry Heerick*. The lease, then vested in *James Gridley*, was assigned to a trustee to prevent merger, and the premises were conveyed to *James Gridley* subject to the lease. No rent was ever paid to the Plaintiff in respect of the part of the loft over his premises. Until the Defendant *James Gridley* acquired the fee, the Defendants paid the whole rent reserved by the lease of 1870 to *Heerick*. Before the lease of the timber premises expired, the Defendants took off the roof from the loft and erected a new structure, placing on it an iron roof instead of a tile gable-ended roof that had existed before. The new structure was of a greater height and heavier than the old one.

The writ in the action was issued on the 3rd of May, 1890.

The Plaintiff claimed an injunction to restrain the Defendants from trespassing on the part of the loft that overhung the Plaintiff's premises, and in the alternative an injunction to restrain the Defendants from erecting a building of greater height or weight than the old loft over the Plaintiff's premises.

Cozens-Hardy, Q.C., and *Tanner*, for the Plaintiff:—

We admit that the Defendants had under the lease, now expired, a right to the possession of the loft as it formerly existed. But the reversion passed by the conveyance to the Plaintiff, and the Defendants have now no right on the premises at all. If, however, they would have a right to the loft as unaltered, they had no right to carry it higher: *Corbett* v. *Hill* (1).

S. Hall, Q.C., and *Daniel Jones*, for the Defendants:—

What was sold and conveyed to the Plaintiff was the *Outrigger* public-house as occupied; it was expressed to be subject to one lease; though the right of way under the other lease was reserved, the conveyance was not made otherwise subject to the lease, as it would have been if it was intended to convey the overhanging part of the loft. The parcels in the Plaintiff's conveyance do refer to the past occupation; there is sufficient to

(1) Law Rep. 9 Eq. 671.

cut down the description on the plan, especially as the plan is on the face of it a ground-floor plan.

On the second point, *Corbett* v. *Hill* (1) is not conclusive: every case must depend on its particular circumstances; a house in *Eastcheap* stands on a different footing from a timber-yard and premises at *Kingston*. It would be reasonable that the space over a loft such as this should belong to the owner of the loft.

NORTH, J.:—

The first thing to be looked at is the conveyance to the Plaintiff made by *Thomas Cucksey*, the son, the then owner in fee. He was absolute owner in fee of both premises, which I will call for convenience lots 2 and 3, subject to a mortgage which was paid off, and subject, as to lots 2 and 3, to two leases, which do not seem to have been exactly co-extensive with lots 2 and 3; but being so entitled, he put up lots 2 and 3 with other property for sale by auction, and at that auction he sold lot 2 to the Plaintiff, but lot 3 was not then sold. It is not suggested that the vendor was then under any contract with the person to whom lot 3 was subsequently conveyed. The conveyance to the Plaintiff contained recitals as to a right of way to other property, and of the lease of 1867; and a recital that the grantor had agreed to convey, subject to the right of way as to lot 1 and the lease. The witnessing part is immaterial till we come to the parcels: they are, "all that piece or parcel of ground situate, lying, and being at *Kingston-upon-Thames*, in the county of *Surrey*, at or near the great bridge there, together with the messuage or tenements, and outbuildings and premises thereon erected, formerly in the occupation of *Charles Melsom*, but now of *Jewitt*, and used as a beerhouse, and called or known by the name of the *Outrigger*; and which said hereditaments and premises, with the dimensions, abuttals, and boundaries thereof, are here particularly delineated in the map or plan drawn on these presents, and thereon coloured green." Now, when we turn to that plan, nothing could be clearer; the neighbouring properties are not shewn. What I understand by the abuttals are the outside lines, and the whole thing, from the plan and the words referring to it,

(1) Law Rep. 9 Eq. 671.

NORTH, J. 1892 LAYBOURN v. GRIDLEY.

is clear, namely, that what is conveyed is the piece of land coloured green, with all the buildings thereon; that, in the absence of anything else to the contrary, passes everything above and below. The Defendants say that part of what is apparently so described is not included in the conveyance, but passed by the subsequent conveyance to *Heerick*, and through him to the Defendant *James Gridley*. Though it does not follow that if the disputed loft was not included in the conveyance to *Heerick* that it was included in the conveyance to the Plaintiff, I do not think it unfair to look at both deeds, especially as on the second point it is material when we come to look at the conveyance to *Heerick*. The Defendants' premises are described as "all that freehold warehouse, timber-yard, and premises situate in *Water Lane*, *Kingston-on-Thames*, aforesaid, bounded on the west by a messuage and premises known as the said *Outrigger* public-house, on the south by the said premises now belonging to the said Mr. *Lucas*, on the east by other premises belonging to the said *Henry Heerick*, and on the north by *Water Lane* aforesaid." Then comes a further description, for the purpose of clearing up what might have been ambiguous before: "Which said last-mentioned premises are more particularly described and delineated, with the abuttals thereof, on the plan drawn on the second skin of these presents, and thereon coloured pink." And there is a large plan, evidently taken from the plan that was annexed to the particulars of sale. The land coloured pink is conveyed: that is a clear and distinct expression, and does not pass anything over what is coloured green in the former conveyance to the Plaintiff. Therefore, looking at both the deeds, the owner of both properties conveys the properties in each case by a plan intended to clear up what otherwise might be doubtful, treating it in each case as an essential part of the description, shewing the dimensions exactly, and indicating the area of the buildings on the ground floor; there is nothing in any way to indicate what is above; therefore, it is clear that what was above was intended to pass to the grantee of the land.

In addition to that there are the leases; the parties have referred to them. I do not think they are matters to be looked at in construing the conveyances. When one does come to look

at them, the property in each lease is described, and only described by reference to the occupation in which it was held, and the properties so described were not conterminous with the properties described in the conveyances. Those leases were important during the continuance of the leases; there is no dispute now as to what was in the leases, and the Plaintiff now admits that the loft was subject to the lease to the Defendant *James Gridley*, which has now expired.

The particulars of sale have been referred to. Those are really of no importance; but when we do come to look at them, so far as they go they are in favour of the Plaintiff.

Upon the first point, therefore, on the construction of the conveyances, especially the Plaintiff's conveyance, I am of opinion that the loft over the Plaintiff's land was included in the conveyance to him, and was not included in the conveyance to *Heerick*.

Then a further point was raised. The Defendants claimed not merely the loft as it existed, but they claimed a right to the space over it. They have pulled the loft down, and substituted a new building, which includes more space than the old building. It is not larger in floor area, but it extends higher up. In my opinion, even if the Defendants were right as to the ownership of the loft, it would not make them owners of the space overhead. Upon that point I think the case of *Corbett* v. *Hill* (1) is conclusive.

Solicitor for Plaintiff: *G. B. Howard.*
Solicitor for Defendants: *John Durham.*

(1) Law Rep. 9 Eq. 671.

D. P.

NORTH, J.

1892

March 18.

EARL OF AYLESFORD *v.* EARL POULETT.

[1886 A. 1480.]

Debtors Act, 1878 (41 & 42 *Vict. c.* 54) [*Revised Ed. Statutes, vol. xviii., p.* 883] —*Trustee—Writ of Attachment—Privilege of Parliament.*

In exercise of its discretion (under the *Debtors Act*, 1878) the Court refused to allow a writ of attachment to issue against a trustee in default for not obeying an order to pay into Court the amount of misapplied trust money, where the trustee had received no personal benefit from breach of trust and was unable to pay:—

Query, whether such trustee, being a peer of the realm, was entitled to privilege from arrest.

THIS was an action brought by the present tenant for life of the *Aylesford* estates, which were settled by the *Aylesford Estates Act*, 1882, and certain supplemental Acts of Parliament. The Defendants to the action were Earl *Poulett* and *F. R. Knollys*, the trustees under the Act, and Lord *Guernsey*, the infant son of the Plaintiff. The trustees were empowered to raise a sum of £350,000 by mortgage of the estates in fee, and out of the money raised to pay debts of the late Earl of *Aylesford*. The action was for an account of the moneys come to the hands of the trustees. An account had been taken, and the trustees had been ordered to pay into Court a sum of £98,458 18*s.* 7*d.* in respect of principal disallowed, and £19,106 in respect of interest found due from them. *F. R. Knollys* was an uncertificated bankrupt.

A motion was now made on behalf of the Plaintiff for leave to issue a writ of attachment against Earl *Poulett* for not having obeyed the order. None of the money had been paid.

Earl *Poulett* set up in answer to the motion privilege of Parliament. He also put in evidence an affidavit to shew that his pecuniary affairs were such that he was unable to pay any part of the money ordered to be paid, and he had been guilty of no moral culpability in misapplying the trust funds. His affidavit was to the effect that he had been unwilling to take upon himself the burden of the trusteeship; but it was pointed out to him by the late Earl of *Aylesford* that the duties, so far as

the trustees were concerned, would not be onerous, as everything would be managed by the solicitor and agents who were then acting for him in getting the Act through Parliament; and ultimately, after some pressure, he reluctantly consented to act.

The affidavit contained the following paragraphs:—

"The sum of £98,458 18*s.* 7*d.* is the amount of disallowances by the Chief Clerk, and is not money which it is in any way suggested that I have in my hands, or from which I have derived any personal benefit whatever. The document now produced to me, and marked P, which has been furnished to me by my former solicitors, contains particulars of the items disallowed; and from such document it appears that such items consist mainly of sums of money paid for debts of the late Earl which were incurred after the date of the said Act of 1882, and were accordingly held to have been wrongly paid; and that other items were disallowed because the formal evidence of payment required was not forthcoming, although as a fact the items were paid; that other items disallowed consist of charges of auctioneers and solicitors, which, although paid, were reduced by the Chief Clerk; and that others consist of interest upon mortgages which, under the terms of the Act of 1882, were primarily payable out of income, and were transferred to income account; whereas I am informed and believe that there was no sufficient income to meet such payments, and they were necessarily paid out of capital.

"At the time I accepted the trust the solicitor of the late Earl was acting for him in the matter of the Act, and he acted for me and my co-trustee in all legal matters connected with the Act down to the month of March, 1883, when Mr. *Fredk. Lovell Keays* was appointed our solicitor, who continued to act for us down to the commencement of this action. All pecuniary matters connected with the trust were attended to by the late Earl's agents, Messrs. *Burr & Co.*, whom I and my co-trustee appointed to represent us, and they made all the payments which are charged in the accounts as having been made by them; but all payments to them as agents for remuneration have been disallowed in the said accounts. I and my co-trustee felt justified in appointing Messrs. *Burr & Co.* as our agents, and it was with

NORTH, J. 1892 EARL OF AYLESFORD v. EARL POULETT.

the full knowledge of the Plaintiff and all his family that the *Estates Act* was being obtained through them, and Messrs. *Burr & Co.* were at that time one of the largest estate agency firms in *London*. Indeed, the Plaintiff knew that it was intended to continue the said Messrs. *Burr & Co.* as the agents of the trustees, and he always recognised them as such agents. I fully relied upon the then solicitors to the trust and the said agents to see that the funds were properly administered, having no business experience myself, and having been assured by the late Earl that his agents would do all the business part of the trust.

"It has never been suggested that I have ever personally derived any pecuniary benefit from my trusteeship, nor, so far as I am aware, is there any suggestion that any payment charged is of itself an improper payment; but such payments as have been disallowed have been so disallowed by the Chief Clerk upon his view and strict construction of the terms of the Act of 1882.

"I have through my solicitor furnished to the Plaintiff's solicitors an account of my affairs, a copy of which is now produced to me and marked P 2. The said account is true in all respects, except that I have omitted a small freehold property at *Soberton* let at £150, of which I am the owner in fee. This property is comprised in the mortgages of my other estates to the income of which I am entitled for my life only. At the time I was appointed a trustee of the *Aylesford* estates, I had an income of about £2000 or £3000 a year from my said estates; but in consequence of the fall in rents this surplus has now been converted into an actual deficit.

"The account shews that I have absolutely no income whatever, and that I am totally unable to pay the sum which is found due from me and my co-trustee, or any part thereof."

Cozens-Hardy, Q.C., and *W. C. Druce*, for the motion:—

In this case the defaulting trustee has shewn no ground of extenuation why in case he could not set up privilege a writ of attachment should not issue.

The issue of a writ of attachment is a punitive measure, and

therefore privilege of Parliament affords no protection against it: *In re Gent* (1).

Sir *H. Davey*, Q.C., and *Vernon R. Smith*, for the Respondent:—

This is a case in which the Respondent has been guilty of no moral culpability, and he is unable to make good any part of the lost fund. No advantage can be gained by allowing the writ to issue. The Court will, therefore, exercise the discretion given to it by the *Debtors Act*, 1878, and refuse to allow the issue of a writ of attachment: *In re Wray* (2).

The privilege of Parliament extends to a case like this, where there is no moral culpability, for the Court will not exercise the jurisdiction for punitive purposes, the test being whether the committal to prison is or is not punitive: *Long Wellesley's Case* (3); *In re Gent*; *In re Armstrong* (4).

The Legislature in the *Trustee Act*, 1888, has recognised the distinction between trustees who misapply trust funds innocently and for their own benefit in limiting the time within which they may be sued in the former case.

Cozens-Hardy, in reply.

NORTH, J.:—

I do not think in this case I ought to exercise the jurisdiction I have, assuming I were to decide against Sir *Horace Davey* on the point of privilege which he has argued. That seems a very nice point indeed, and I do not think it is a very easy point. I do not think I should be prepared to decide it without consideration, but it is not necessary for me to decide it now. But assuming that point against him, I think this is not a case in which I ought to exercise the powers of punishing this gentleman as for a criminal offence. The observation of Mr. *Vernon Smith* on the *Trustee Act*, 1888, bears very strongly in that way; and, in addition to the cases which have been cited, there is a case to which I should like to refer, strongly taking the same

(1) 40 Ch. D. 190.
(2) 36 Ch. D. 38.
(3) 2 Russ. & My. 639.
(4) [1892] 1 Q. B. 327.

NORTH, J.
1892
EARL OF AYLESFORD v. EARL POULETT.

view and distinguishing between breaches of trust which are serious offences, and breaches of trust which in a sense are less so. I refer to the case of *In re Knowles* (1), before Mr. Justice *Kay*. There the head-note is this: "The exception contained in sect. 4, sub-sect. 3, of the *Debtors Act*, 1869, was intended for the punishment of fraudulent trustees, not merely in order to inflict personal inconvenience on the defaulters, but to deter other trustees from committing fraudulent breaches of trust."

Now, looking at the nature of the breach of trust committed here, I do not see how any warning would be conveyed by the imprisonment of the debtor, or how it could operate upon trustees committing fraudulent breaches of trust, because in my opinion this is not one. Then in the judgment Mr. Justice *Kay* says this: "In this case a trustee, who had trust moneys in his possession or under his control, concurred in lending those moneys to a firm in which he was partner—in fact, lending them to himself—and by that lending, which was entirely unauthorized by the instrument under which he was trustee, the moneys were lost through the insolvency of the firm—that is, in fact, the insolvency of himself; and therefore he is a trustee who has put trust moneys into his own pocket, has spent them, and lost them. That seems to me to come within the term, as used in this Court, of fraudulent misappropriation of trust moneys—a thing which this defendant had no right to do, and which a trustee, of all persons in the world, ought to be careful not to do. He may improperly invest moneys—that is a comparatively lenient offence; but to put them into his own pocket and mix them with his own moneys, whereby they are lost, is one of the most improper acts a trustee can possibly commit."

Therefore, if I can draw a distinction, as I think I can, between a breach of trust that is a gross offence, such as a fraudulent misappropriation of money to the trustee's own use, and what the learned Judge there treats as a comparatively venial offence, such as applying money in what is believed to be a proper application of the money under the trust, but which turns out not to be a proper application either because he trusted to an agent who deceived him, or because he trusted to the advice of some-

(1) 52 L. J. (Ch.) 685.

body who advised him that the investment was right when it was wrong, I think that is a comparatively venial offence with respect to which, that being the nature of the case here, I do not feel it incumbent upon me to say that the trustee has done anything deserving of punishment as for a criminal offence. I see the debt is very, very large, and, more than that, looking at his balance-sheet, which has been put in as an exhibit, I see no reason whatever to suppose that there is any contumacious refusal on his part to do the best he can to make good his breach of trust. I do not think under those circumstances it is a case in which I ought to enforce the order by attachment.

Solicitors for plaintiff: *Bennett, Dawson, & Bennett.*
Solicitors for Earl *Poulett*: *Hammond & Richards.*

D. P.

A. L. SMITH, J.

1892

Feb. 23, 25, 26, 29; *March* 1, 2, 3, 4, 5, 7, 8, 14, 15, 16, 18, 30.

LANE FOX *v.* KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY.

[1890 L. 2713.]

Patent—Validity—Provisional Specification—Variance from Amended Complete Specification—Nature of Invention—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 5 *sub-s.* 3, 26.

A patentee must, in his provisional specification, describe the nature of his invention, though he need not go into detail. In his complete specification, when going into detail, he must describe the same invention; if not, his patent is void, although the variation is occasioned by the operation of a disclaimer amending the complete specification.

In 1878 the Plaintiff took out a patent for "Improvements in obtaining light by electricity, and in conveying, distributing, measuring, and regulating the electric current for the same, and in the means or apparatus employed therein."

In his provisional specification the Plaintiff described how he obtained the light and the incandescent lamp he proposed to use, the mode of conveying the light, a mode of distributing it by means of a conductor with branches and sub-branches, and a mode of measuring it, and then stated: "The electro-motive force of the electric conducting mains should be kept as nearly as possible constant at, say 100 volts." "A number of *Planté's* (lead and sulphuric acid) cells" (a well-known form of secondary batteries), "joined together in series between the main and the earth will serve as a kind of reservoir for the electricity." After describing the conductor to be used, the provisional specification proceeded: "In order to keep the electro-motive force in the electric mains constant, it is desirable to have in the first place several generating machines; next, it is necessary to have some regulator, such as those about to be described;" that is, a method of regulating the electro-motive force by means of a quadrant electrometer, no regulation by means of the batteries being mentioned.

In 1879 the Plaintiff filed his complete specification, wherein, after describing, in greater detail, his methods of obtaining light by electricity, and conveying, distributing, and measuring the electric current, and repeating in substance the statements in the provisional specification as to the keeping constant of the electro-motive force in the mains and the placing the batteries in series serving as a "kind of reservoir of electricity," and pointing out the use of the batteries for storage when little electricity was wanted for lighting purposes, he stated that "in order to keep the electro-motive force in the electric mains constant, it is desirable to have in the first place several generating machines, also a number of reservoir batteries as above explained; next, it is necessary to have some regulator such as that about to be described." The method of regulating with the

aid of a quadrant electrometer was then re-described in detail, and the improvements he sought to attain were set forth.

In 1882 the Plaintiff disclaimed his claims in respect of measuring and conveying electricity; and in 1883 he farther disclaimed his claims for distribution, whether alone or in conjunction with the incandescent lamps, and for regulating the electric current by means of the electrometer, the result being, that by his complete specification as amended by disclaimers, he then only claimed for improvements in distributing and regulating the electric current for obtaining light by electricity by means of the employment of secondary batteries as reservoirs of electricity in combination with a mode or system of distribution of electric energy:—

Held, that the provisional specification and complete specification after the disclaimers did not describe the same invention; that the provisional specification, read most favourably for the Plaintiff, claimed for secondary batteries the invention of keeping the electro-motive force constant in the mains, and for the electrometer the invention of regulating that force; whereas the complete specification, after the amendments by way of disclaimer, was made to claim, for secondary batteries, not only the power of keeping the electro-motive force constant in the mains, but also of regulating it, which had theretofore in the provisional specification and original complete specification only been claimed for the electrometer.

ST. GEORGE LANE FOX, obtained on the 9th of October, 1878, Letters Patent for an invention intituled "Improvements in obtaining light by electricity, and in conveying, distributing, measuring, and regulating the electric current for the same, and in the means or apparatus employed therein."

His provisional specification, filed on the 9th of October, 1878, stated that his invention consisted of "improvements in obtaining light by electricity, and in conveying, distributing, measuring, and regulating the electric current for the same, and in the means or apparatus employed therein"; and that the inventor, in order to produce a light, passed the electric current through thin leaves or foil of some suitable material, preferably platinum or an alloy of platinum and iridium. The provisional specification then described the electric incandescent lamp intended to be used, and proceeded as follows:—"The way in which I work a number of these lamps from a single source of electricity is as follows:—From one pole or electrode of the electric generator or generators proceeds a large conductor, from which branch out, at various points where lights are desired, smaller conductors which again may have conductors branching off from them, and so on." He then pointed out how the

A. L. SMITH, J.
1892
LANE FOX v. KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY.

connection with the earth was made, "so that, wherever the circuit is complete between the earth and any one of these branches, a current of electricity will pass through the thin leaf of metal rendering it incandescent, and so produce light." The provisional specification then pointed out how the electricity used was measured, and concluded as follows:—

"The electro-motive force of the electric conducting mains should be kept as nearly as possible constant at, say, 100 volts or *British Association* units of electro-motive force. A number of *Planté's* (lead and sulphuric acid) cells, joined together in series between the main and the earth, will serve as a kind of reservoir for the electricity. In order to keep the electro-motive force in the electric mains constant, it is desirable to have, in the first place, several generating machines; next, it is necessary to have some regulator such as that about to be described. In my regulator I make use of what is known as the quadrant electrometer; in this instrument the position of the suspended needle will depend on the relative electro-motive force of the so-called quadrants. By connecting this instrument with the main and the earth in the ordinary way, the electro-motive force of the main will determine the position of the suspended needle. If it increases or decreases, the position of the needle will be altered accordingly. Now, I fit this electrometer with small pegs so that a slight deviation of the needle one way or the other will bring it in contact with one of the pegs, and thus complete a circuit, and set up the electric current, which, acting upon an electro-magnet, sets a lever or other suitable device in action. The contact with each peg forms a separate circuit acting independently on two of these levers or other devices, which are in connection with steam valves, one diminishing, the other increasing the supply of steam to the engine which works the electric generators. The electro-motive force can be regulated either in this manner or by otherwise effecting the action of the electric generators through the instrumentality of the currents set up by the pegs above described, so as to increase or diminish the action of the generators."

On the 9th of April, 1879, *St. George Lane Fox* filed his

complete specification, which, in the parts below set out *verbatim*, included as originally filed the portions inclosed in square brackets, but not the portions set out in italics. The title of the complete specification was: "Improvements in [obtaining light by electricity and in conveying], distributing, [measuring] and regulating the electric current for *obtaining light by electricity*, [the same] and in the means or apparatus employed therein."

The complete specification commenced with a statement that the invention consisted of "improvements in [obtaining light by electricity and in conveying,] distributing, [measuring] and regulating the electric current for *obtaining light by electricity* [the same] and in the means or apparatus employed therein," and then stated that the Plaintiff, in order to produce a light, passed the electric current through "a thin strip or wire of some suitable material," preferably "an alloy of platinum and iridium," and proceeded to describe the proposed electric incandescent lamp in much more detail than it had been described in the provisional specification.

The complete specification then described, again in greater detail and with the aid of diagrams, the way in which the Plaintiff distributed the electric energy so as to work a number of the lamps from a single source of electricity, by means of conductors, branches, and sub-branches, and the way in which he measured the quantity of electric force or energy used, and continued as follows:—

"The electro-motive force of the electric conducting mains should be kept as nearly as possible constant at, say, 100 volts, or *British Association* units of electro-motive force. A number of secondary batteries, such as *Planté's* (lead and sulphuric acid) [or those formed with plates of copper in a solution of bicarbonate of soda], such batteries being joined together in series between the main and the earth, will serve as a kind of reservoir for the electricity. The cells should have a very large conducting surface, and there should be several batteries connected up at various points of the mains, so that by increasing the electro-motive force during the hours when not much electricity is being used, they will become charged, and the electric force will be

A. L. SMITH, J.
1892
LANE FOX v. KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY.

stored up in them so that a sufficient supply will be available, when the electro-motive force falls owing to the draft from the mains, when the force is most used and needed. The number of cells in each of these batteries will depend on the electro-motive force of the mains. Fig. 5 is a diagram representing a secondary battery joined up between the main and the earth for the purpose above described. E indicates earth and *l* lamps."

After repeating, in effect, the statements in the provisional specification as to the conveyance of the current through copper conductors, describing the conducting mains, and pointing out the preferable mode of insulating, the complete specification continued as follows:

"In order to keep the electro-motive force in the electric mains constant, it is desirable to have, in the first place, several generating machines; also a number of reservoir batteries as before explained [next, it is necessary to have some regulator, such as that about to be described. In my regulator I make use of what is known as the quadrant electrometer; in this instrument the position of the suspended needle will depend on the relative electro-motive force of the so-called quadrants. By connecting this instrument with the main and the earth in the ordinary way the electro-motive force of the main will determine the position of the suspended needle. If it increases or decreases, the position of the needle will be altered accordingly. Now I fit this electrometer with small pegs, so that a slight deviation of the needle, one way or the other, will bring it in contact with one of these pegs, and thus complete a circuit, and set up the electric current, which, acting upon an electro magnet, sets a lever or other suitable device in action. The contact with each peg forms a separate circuit, acting independently on two of these levers or other devices, which are in connection with steam valves, one diminishing, the other increasing, the supply of steam to the engine which works the electric generators. The electro-motive force can be regulated either in this manner, or by otherwise effecting the action of the electric generators, through the instrumentality of the currents set up by the pegs above described, so as to increase or diminish the action of the generators. Fig. 6

represents a quadrant electrometer adapted to regulating the electro-motive force in the mains as just described. . . .”]

“And having now described the nature of my invention, and in what manner the same is to be performed, I declare *that I do not claim generally the obtaining of light by the incandescence of a continuous conductor, nor the lamps represented in Figs.* 1 *and* 2, *and hereinbefore described, but* [that] I claim as my ‘Improvements in [obtaining light by electricity and in conveying] distributing [measuring] and regulating the electric current for *obtaining light by electricity* [the same], and in the means or apparatus employed therein.’ [First: The mode or system hereinbefore described of distributing the electric current by mains, branches, and sub-branches with returns by ‘earth.’ Second: In combination with the said mode or system of distributing the electric current by mains, branches, and sub-branches, with returns by ‘earth,’ I claim the production of light by the incandescence of a continuous conductor as hereinbefore described. Third: The means or apparatus, substantially as hereinbefore described, with reference to Fig. 4, for measuring the amount of electricity passed through conductors. Fourth:] The employment as described of secondary batteries as reservoirs of electricity in combination with a mode or system of distribution such as is hereinbefore explained. [Fifth: The employment of petroleum or rock oil, or other suitable insulating liquid, in the space between the conductor and the pipes in which they are laid, as hereinbefore described. Sixth: Constructing apparatus substantially as hereinbefore described and represented in Fig. 6, for regulating the electro-motive force in the main by which the electricity is conveyed. Seventh: The combination of the means or apparatus hereinbefore described for obtaining light by electricity, and conveying, distributing, regulating, and measuring the electric current for the same. Eighth: Obtaining light by the incandescence of a continuous conductor, as hereinbefore described and as represented in Figs. 1 and 2 of the annexed drawings. Ninth: Insulating the conductors for conveying electricity for lighting purposes by means of earthenware or other insulating supports in pipes, as hereinbefore described.]

On the 26th of January, 1882, *St. George Lane Fox* disclaimed

A. L. SMITH, J.

1892

LANE FOX v. KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY.

his claim to the appliances for measuring and conveying electric energy, and on the 30th of July, 1883, he disclaimed his claim in respect of the distribution of the electric current, whether alone or in conjunction with the incandescent lamp, and also his claim in respect of the regulator operating by the electrometer and the appliances connected with it.

The effect of the two disclaimers on the complete specification was that, as amended, the words above set out in italics were added, and the parts enclosed in square brackets were expunged.

On the 15th of November, 1890, *St. George Lane Fox* commenced an action against the *Kensington and Knightsbridge Electric Lighting Company, Limited*, alleging that the Defendants had infringed his letters patent by the use of secondary batteries as reservoirs of electric energy in combination with the said system of distribution; and he claimed an injunction to restrain such infringement from being continued and other relief.

By his further particulars of breaches, the Plaintiff stated that the modes of distribution used by the Defendants, of which he complained, were: 1. "The use of the secondary batteries in combination with a number of lamps placed in multiple arc between two main leads. 2. The use of secondary batteries in combination with two or more systems of multiple arc distribution in which one or more of the main leads are common to two or more of the said systems."

The Defendants, by their statement of defence, alleged (*inter alia*) that the Plaintiff's letters patent were invalid on the ground that the alleged invention described and claimed in the Plaintiff's complete specification as amended was not the same as that described in the provisional specification, but differs therefrom in describing a method of regulating the electrical current by means of secondary batteries or accumulators of electricity, which system of regulation is totally different from that of the quadrant electrometer. That the complete specification, as amended by the disclaimers, dated the 26th of January, 1882, and the 30th of July, 1883, claimed an invention substantially different from the invention claimed by the original specification filed in pursuance of the grant of the said letters patent.

The action was tried before Mr. Justice *A. L. Smith*, sitting for Mr. Justice *Romer*, on the 23rd, 25th, 26th, and 29th of February, and the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 14th, 15th, 16th, and 18th of March, 1892.

Sir *R. E. Webster*, A.G., *Moulton*, Q.C., and *J. C. Graham*, for the Plaintiff:—

By interposing secondary batteries in his circuit, between the generator and the earth, the Plaintiff obtains a constant current so far as pressure is concerned. The Defendants say that the complete specification is not in conformity with the provisional one, but that is not correct. In the provisional specification, one of the improvements effected by the invention is "regulating the electric current." The Plaintiff states that the electro-motive force should be kept constant at, "say, 100 volts," and that pressure, pointed out by him in 1878, is to-day the best electro-motive force for working lamps in any system which has been devised. Then he states that the secondary batteries, in series between the main and the earth, will serve as a reservoir; and subsequently states that, "in order to keep the electro-motive force in the electric mains constant," it is necessary to have several generating machines and "some regulator" such as he describes. The Defendants say that the indication of this regulator prevents the Plaintiff from saying he used the secondary batteries as regulators; but the regulator thus described is for keeping the steam which drives the engine constant, and has no relation to the functions performed by the secondary batteries. In the complete specification as amended the claim for improvement by regulating is retained. The statements as to keeping the electro-motive force constant at 100 volts, and as to placing the secondary batteries, are in effect repeated; and then occurs the passage as to the large conducting surface of the cells connecting the batteries at various points, and the storing up in them for the time when the force is most needed. He also states that, in order to keep the force constant, it is necessary not only to have a number of generators, but also a number of reservoir batteries. By his amendments, the Plaintiff discards everything (including the steam regulator) but the use of secondary

A. L. SMITH, J.

1892

LANE FOX v. KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY.

batteries. The Defendants have used secondary batteries in exactly the same way, and have not so improved on the Plaintiff's system as to escape infringing his patent.

Sir *H. Davey*, Q.C., *Finlay*, Q.C., and *R. W. Wallace*, for the Defendants:—

The patent has been amended in such a way as to make it appear that there is a claim for automatic regulation by means of the secondary batteries, whereas the patent was originally granted for something wholly different. If a patent is taken out for a mode of regulating electric light, a particular detailed mode, in which the patentee achieves his object, being shewn by the specification; he cannot by amendment strike out the whole of that claim because he finds out that there is an inherent property in some other part of his improvement which will achieve the same object. By the provisional specification the Plaintiff alleges improvement in five things, one of which is regulating the electric current. The only claim in respect of secondary batteries is as reservoirs of electricity—not as regulators. The only improvement by regulation mentioned in the provisional specification is by the use of the quadrant electrometer. The complete specification also claims for an improvement by regulation; and it is stated that, in order to keep the electro-motive force in the mains constant, it is desirable to have, not only several generating machines, as stated in the provisional specification, but also "a number of reservoir batteries as before explained." But it is only a recommendation, not a direction. Even as a direction, it would only be to increase the number of generators and batteries, not to use them in any particular way. Then he says it is necessary to have some regulator such as the electrometer, which is described, and shews how the force is regulated by the means pointed out. All he says about regulation is, that it is effected by that regulator. The claim in the complete specification is for "the employment, as described, of secondary batteries as reservoirs of electricity," not as regulators. The first disclaimer left untouched the claim in respect of regulation by the electrometer, shewing that that was all the regulation originally contemplated. But in the second disclaimer the

Plaintiff, while retaining regulation in his title and claim, and retaining the words, that, "in order to keep the electro-motive force in the electric mains constant, it is desirable to have" "a number of reservoir batteries as before explained," strikes out the words as to the necessity for the regulator described, the electrometer, and the description of it, and also the claim for it as an improvement, and claims for, amongst other things, "regulating" by the employment of secondary batteries. This mode of disclaiming and altering the specification makes a substantial alteration in the nature of the invention. "Regulating" ought to have been struck out altogether, for automatic regulation by the batteries was a different thing from what was originally claimed, viz., regulation by the mechanical appliances previously described, but afterwards discarded. The provisional specification need not go into all the minute details as to how the invention is to be carried out: *In re Newall and Elliot* (1). It need not contain a complete description of the thing, so as to enable a workman of ordinary skill to make it, but must disclose the invention, fairly but in its rough state, until the inventor can perfect its details: *Stoner* v. *Todd* (2). Nevertheless, the invention must be described with sufficient precision and accuracy to inform the law officer what is to be the subject-matter of the patent: *Penn* v. *Bibby* (3). A patentee cannot, under the form of a disclaimer, make material additions to the original specification, so as, by the aid of the corrected form of words and the additions so made, to introduce into the specification an accurate and perfect description of an invention not to be found in the original specification: *Ralston* v. *Smith* (4).

[They also referred to *Johnson's* Patentee's Manual (5).]

Sir *R. E. Webster*, in reply:—

There is no authority suggesting that, if a patentee has in his provisional specification described in general terms what he proposes to do, it is any ground of objection that he does not point out the advantages either in the provisional or complete

(1) 4 C. B. (N.S.) 269.
(2) 4 Ch. D. 58, 60.
(3) Law Rep. 2 Ch. 127.
(4) 11 H. L. C. 223, 244.
(5) 5th Ed. p. 107.

A. L. SMITH, J.

1892

LANE FOX v. KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY.

specification. You must look at the invention described in the provisional specification; and if what you have been doing, and which you say is part of the patent, is fairly within the nature of the invention described, you are protected—if it is a new and separate and different invention you are not protected. When the nature of an invention has been described in the provisional specification, if something is found out during the six months to make the invention work better, or with respect to the *modus operandi*, still the nature of the invention remains the same, and it is no objection that in the complete specification the invention is described more particularly, or even if more discovery is shewn, so as to make the invention described in the provisional specification really workable: *Bailey* v. *Roberton* (1). In other words, the description in the complete specification must be within the fair ambit of that given in the provisional specification; but there is no disconformity merely because advantages are pointed out in the complete specification which are not pointed out in the provisional specification. Regulation is not merely stopping the flashes due to the engine running irregularly. The regulation is this, that whether there are more lamps on, or less lamps on, whether there is a current in the main given from the dynamo alone, or given from the dynamos and batteries, there will be constancy of pressure and of electro-motive force. In the provisional specification the Plaintiff points out that the electro-motive force must be kept as nearly as possible constant, and that involves regulation; the second batteries being used as a "kind of reservoir," but not as a mere reservoir for storage, for *Planté* had told people of that for years. The Plaintiff knew that the effect of the engines might vary, and he thought some such regulator as he described was necessary, and afterwards he found it unnecessary and disclaimed it. But that does not deprive him of the benefit of the previous description. The provisional specification shews that regulation by means of the secondary batteries was part of the nature of the invention there described. Sects. 6 & 8 of the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83), required only that "the nature of the invention" should be described in the provisional specification;

(1) 3 App. Cas. 1055, 1075.

but under that Act it was held that the nature of the invention need not be described in the provisional specification with minute particularity, or that the mode in which the invention was to be worked or carried out should be described; and that the complete specification was to be supplemental to the provisional, not varying from it as to the nature of the invention, but conveying additional information as to how the invention was to be performed: *Penn* v. *Bibby* (1). And under the *Patents, Designs, and Trade-marks Act*, 1883, it has been held that although a patentee in his provisional specification has stated a different mode of carrying his invention into effect from that which he has described in his complete specification, the patent is not bad if both are really within the invention described in general terms in the provisional specification: *Woodward* v. *Sansum & Co.* (2).

[They also referred to *In re Newall and Elliot* (3) and *United Telephone Company* v. *Harrison, Cox-Walker and Co.* (4).]

[A. L. SMITH, J., referred to *Nuttall* v. *Hargreaves* (5).]

1892. March 30. A. L. SMITH, J.:—

This is an action brought by Mr. *St. George Lane Fox*, an electrician of high repute, to test the validity of a patent taken out by him on the 9th of October, 1878. The Plaintiff alleges that he then hit upon the idea that, by utilizing secondary batteries, as invented by *Planté*, and coupling them up to the mains which conveyed the electro-motive force in his system of distribution of electricity, such force could be kept constant in the mains, and thus an even steady light would be had in incandescent lamps which otherwise would not be. The Attorney-General designated this invention as being one to keep a constant potential (6) at the lamps with a variable load.

It has been proved that the system of distribution of electric

(1) Law Rep. 2 Ch. 127, 132.
(2) 4 Rep. Pat. Cas. 166, 174.
(3) 4 C. B. (N.S.) 269.
(4) 21 Ch. D. 720.
(5) [1892] 1 Ch. 23.
(6) "Potential" has since been defined by Lord Halsbury, L.C., in the House of Lords, as meaning "the intensity of pressure by which the electricity is caused to pass along a conductor": *Anglo-American Brush Electric Lighting* v. *King*, April 5, 1892.

A. L. SMITH, J. 1892 LANE FOX v. KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY.

current for incandescent lighting, in conjunction with the use of secondary batteries as reservoirs, was a novel and valuable suggestion which has aided the perfecting of that science which has culminated in the incandescent lighting of the present day, and it certainly appears to me that, if the Plaintiff did invent and carry to a practical result what is now claimed for him, he is an inventor of very great merit.

Some ten years prior to the year 1878, *Gaston Planté* had invented and brought into use what is known as a "secondary battery," that is, a reservoir in which the electric current emanating from a generator could be stored. *Daniell*, my Brother *Grove*, and *Smee* had also invented cells to act as accumulators of electric energy, and these were in common use in telegraphy and other electrical work.

This secondary battery of *Planté* consists of a number of cells joined together, each cell holding sulphuric acid, in which are immersed plates of lead rendered porous and oxidized by a process fully described by him.

These secondary batteries had, before 1878, been used for the storage of electric energy, and utilized, among other things, for the ringing of bells or kindling lights, the energy, when wanted, being let out of the secondary battery by the pressure of a button, as is well known to many.

Prior to 1878 attempts had been made at lighting by electricity, the means adopted being to place arc lamps into what is called series—that is, into line—and to pass the electric current through each lamp and thence to what is known as "earth." This system, though suitable to the lighting of lamps in streets and such like, was not adapted to light the interior of houses and other buildings, as is now done by incandescent lighting, and, to use the words of Sir *Frederick Bramwell*, a director of the defendant company, "The great question of the day was the distribution of electric light."

In this state of circumstances the Plaintiff took out his patent of the 9th of October, 1878. In it, among other things, he sought to bring about a distribution of the electric current, or, in other words, to divide the main current into a number of small currents branching off from the main current, and again branching off

from them, so that by placing his lamps into what is called parallel—that is, at the side of the main current instead of in a line with it—each lamp might be fed by a small current which, when it had performed its mission at the lamps and exhausted its energy, or, in technical language, had reached zero potential, should pass on therefrom to earth. By this means of distribution of the electric current, and the other means stated in the specification, the Plaintiff designed to light, by incandescent lighting, towns and other inhabited districts. The name the Attorney-General gave to the proposed system was "The Multiple-Parallel Incandescent Bridge."

The Plaintiff, as before stated, for the purpose of carrying out his proposal, determined to couple up the secondary batteries of *Planté* to his system of distribution. The complete specification as it now stands, states that the purpose for so doing was to distribute and "*regulate the electric current*" for obtaining light by electricity. The Plaintiff's case is, that, by coupling up secondary batteries to the mains, the electric energy therein would flow from the mains into the batteries when the energy in the mains was above equilibrium, and also reflow from the batteries into the mains when the energy therein was below equilibrium, and that thus a constant potential would be kept in the mains and the light in the lamps steady.

The Defendants, in the first place, assert that the specification shews that *Planté* batteries were resorted to by the Plaintiff, not for the purpose, as he now states, of regulating the electric current, but for the purpose of storing up what excess motive force might emanate from the generator when the load upon the main was light, or, in other words, when lamps were off, and of using such stored up force when the load upon the mains became heavy—*i.e.*, when the lamps were on—or when the generator was not at work. They say that the present claim of the Plaintiff, as to using secondary batteries for regulating the electric current, is not to be found in the complete specification as it originally stood, and that it is only rendered possible by an adroit amendment made therein in the year 1883, when the second disclaimer took place.

It becomes necessary to see what the complete specification

A. L. SMITH, J.
1892
LANE FOX v. KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY.

did contain when filed on the 9th of April, 1878. The Attorney-General, in opening the case, and again at the end of his reply told me that if Mr. *Lane Fox* had now, in the year 1892, to sit down and re-write a provisional and complete specification of his invention of 1878, with all his subsequent knowledge, he would write them again in the same words and the same form. This statement in reply somewhat stretched my credulity, seeing that he and Sir *Horace Davey* had occupied me for fifteen days in trying this case, a very considerable portion of which had been taken up in discussing what the two documents meant.

By the complete specification, Mr. *Lane Fox* claimed for improvements in electric lighting by, amongst others, the six following means:—(1) By means of the distribution of electric energy by mains, branches, and sub-branches; (2) by means of this distribution in conjunction with incandescent lamps; (3) by means of an apparatus for measuring electricity; (4) by means of the employment of secondary batteries as reservoirs in combination with his system of distribution; (5) by means of the use of a regulator and other mechanical mechanism wherewith to regulate the electro-motive force in the mains; (6) by means of mechanism wherewith to convey electric energy. On the 26th of January, 1882, the Plaintiff disclaimed his claim to his appliances wherewith to measure and to convey electric energy, and on the 30th of July, 1883, he further disclaimed his claim to his distribution of the electric current, whether alone or in conjunction with the incandescent lamp, and also his claim to the regulation of the electric energy by the electrometer.

It will be seen that all that was left of his patent, as the specification now stood, was his claim for distributing and regulating the electric current for obtaining light by electricity by means of the employment of secondary batteries, as reservoirs of electricity, in combination with a mode or system of distribution of electric energy.

In the complete specification, after describing a lamp and the way of distributing the electric energy and the means for measuring it, the Plaintiff makes this statement: "The electro-motive force of the electric conducting mains should be kept as nearly as possible constant at, say, 100 volts or *British Associa-*

tion units of electro-motive force." The Attorney-General, in opening this case, stated that this mention of 100 volts shewed the foresight of Mr. *Lane Fox*, for it was the pressure now universally adopted. This, upon the evidence, appears not to be so, nor does there seem to be any special virtue at all in having a pressure of 100 volts.

[His Lordship referred to evidence as to the pressure now used in various places, and continued :—]

Mr. *Lane Fox* then proceeds to deal with secondary batteries as follows: "A number of secondary batteries, such as *Planté's* (lead and sulphuric acid) . . . such batteries being joined together in series between the main and the earth, will serve as a kind of reservoir for the electricity. The cells should have a very large conducting surface, and there should be several batteries connected up at various points of the mains, so that, by increasing the electro-motive force during the hours when not much electricity is being used, they will become charged, and the electric force will be stored up in them, so that a sufficient supply will be available, when the electro-motive force falls owing to the draft from the mains, when the force is most used and needed. The number of cells in each of these batteries will depend upon the electro-motive force of the mains. Figure 5 is a diagram representing a secondary battery joined up between the main and the earth for the purpose above described. E indicates earth, and *l* lamps."

It is true that in the paragraph about secondary batteries Mr. *Lane Fox* does not mention anything about their being employed to keep the electro-motive force in the mains constant, but in another place he is explicit on the matter. He says: "In order to keep the electro-motive force in the electric mains constant, it is desirable to have, in the first place, several generating machines, also a number of reservoir batteries as before explained." He then goes on to disclose his electrometer as follows: "Next, it is necessary to have some regulator such as that about to be described. In my regulator I make use of what is known as the quadrant electrometer." He then describes the instrument, and finishes thus: "The electro-motive force can be regulated either in this manner or by otherwise

A. L. SMITH, J.
1892
LANE FOX v. KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY.

effecting the action of the electric generators through the instrumentality of the currents set up by the pegs above described, so as to increase or diminish the action of the generators."

It was known to electricians at the time that, by reason of the resistance of the mains, the further the electric current travelled up them from the dynamo, the less was the potential in that current; or, in other words, that, by reason of the resistance of the mains, the further the lamps upon circuit were situated from the dynamo, the less illuminating power they received. This, upon a long circuit, was matter of moment.

Anxious as I am to read the specification in favour of the patentee, I cannot do so without seeing that Mr. *Lane Fox*, when he drafted it in April, 1879, had in his mind, as regards the matter now in hand, two separate and distinct ideas. The one was, that by coupling up secondary batteries to his system of distribution of electric current, he might be able to neutralize the pressure of the mains, and thus render constant the electro-motive force therein (this would be in aid of the dynamo). The other was to regulate such electro-motive force in the mains (and this, as it seems to me, was for the benefit of the lamp). These ideas are separate and distinct.

In my judgment, the Defendants are not correct when they state that Mr. *Lane Fox*, by this specification, only claimed the use of secondary batteries as reservoirs, for, by these batteries he also claimed to keep the electro-motive force in the mains constant. I am against the Defendants on this point.

The Defendants, however, say that, if the specification is to be read as I read it, the patent is bad, because the complete specification, as it now stands, is not in conformity with the provisional. This point appears to me to be a formidable one for the Plaintiff.

It is unnecessary to go over the earlier cases cited by counsel on either side, for they are dealt with in the late case in the Court of Appeal of *Nuttall* v. *Hargreaves* (1). The law is clear. It is this: A patentee must describe the nature of his invention in his provisional specification. He need not go into details, but he must describe, as I have said, the nature of his invention.

(1) [1892] 1 Ch. 23.

In his complete specification, when going into detail, he must describe the same invention; if not, the patent is bad.

Now, what has Mr. *Lane Fox* done here? In his provisional specification he states: "The electro-motive force of the electric conducting mains should be kept as nearly as possible constant at, say, 100 volts or *British Association* units of electro-motive force. A number of *Planté's* (lead and sulphuric acid) cells, joined together in series between the main and the earth, will serve as a kind of reservoir for the electricity." "In order to keep the electro-motive force in the electric mains constant, it is desirable to have in the first place several generating machines." It must be noticed that he does not here state that secondary batteries are available for this constancy, as in his complete specification he does, but proposes that the generators should keep the electro-motive force constant and not even in conjunction with the secondary batteries. He then goes on to state that it is necessary to have the electrometer for the purpose of regulating the electro-motive force.

This provisional specification, reading it most favourably for the Plaintiff, can only be read to claim, for the invention of using secondary batteries, the keeping of the electro-motive force constant.

I have no doubt that in the complete specification, as originally filed in April, 1879, the words "regulating the electric current" at page 3, line 16, and at page 5, line 44 (1), were solely applied to the electrometer. What has been done is this: Upon disclaiming the electrometer on the 30th of July, 1883, four years after the complete specification, it was sought to apply the words "regulating the electric current," which had been theretofore applicable solely to the electrometer, to secondary batteries, so as to claim for them, not only the power of keeping the force constant in the mains, but of regulating it therein. The question is, Does the Plaintiff now claim for the same invention in his complete specification as it stands, as he did in his provisional specification? I say he does not.

In the provisional specification he claimed as his invention the use of secondary batteries, in aid of the dynamo, to keep the

(1) The beginning and end of the specification.

A. L. SMITH, J.

1892

LANE FOX v. KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY.

electro-motive force in the mains constant, whereas he now, by his amendment of his complete specification, claims as his invention the use of secondary batteries, not only to keep the electro-motive force constant in the mains in aid of the dynamo, but also to regulate the electro-motive force in the mains for the benefit of the lamps. The case is this: In the provisional specification he claimed, by his use of secondary batteries, invention X. In the provisional specification he further claimed, by his use of the electrometer, invention Y. In the complete specification he now claims by the use of the secondary batteries, inventions X + Y. How can it be said that he now claims in the complete specification the same invention as he did in the provisional, unless X and Y are the same invention, which, in my judgment, they are not? And, what is more, the evidence leads me to conclude that secondary batteries when coupled up to the main will, under certain conditions, bring about some of the regulative force originally claimed for the electrometer, but automatically will not bring about the constancy originally claimed for them.

The eminent electricians called by the Plaintiff, in conjunction with those called by the Defendants, have satisfied me that in some circumstances, especially when fully charged, secondary batteries coupled to the Plaintiff's system of distribution have an inherent power of regulating the electro-motive force in the mains, but the amount and value of such power was matter of keen dispute. The evidence shews that the batteries, automatically worked, will not keep the electro-motive force in the mains constant.

The Plaintiff declared that his invention was a departure from many of the things written before 1878, and, as regards that part of his invention for distributing electric current, together with coupling up of secondary batteries to the mains, I think may be so.

[His Lordship referred in detail to the evidence of the witnesses with respect to the extent of regulations effected by secondary batteries, and continued:—] In my judgment the Plaintiff, as to the controlling effect of secondary batteries, has placed his case too high, and the real truth is that if there be a short quick flicker at a lamp, a secondary battery coupled up to a main

will at times help to diminish it; but that second batteries, as designed to be used by the Plaintiff, *i.e.*, to work automatically and without mechanical and manual devices, will not bring about that constancy of pressure which the Plaintiff claimed for them in his original specification.

The result of the evidence upon this head I may, I think, accurately sum up in the words of an article in the *Engineer* newspaper of the 26th of December, 1890, which the Attorney-General used largely in cross-examination of the Defendants' witnesses. Mr. *Crompton*, Mr. *Miller*, and Mr. *Kennedy* said that the words were fairly accurate. They are as follows: "One of the advantages found by having more than one pair of batteries attached to the system at points tolerably wide apart is, that the effect of the regulating movement of switching in an extra cell which would show a difference of two volts on the lamps, is partly neutralized by the distant battery." Mr. *Lane Fox*, in his declaration made in March, 1883, stated that the effect of the change of about one volt upon a lamp was practically nothing; and if Professor *Forbes* was correct in stating that there was a change going on of from fifteen to twenty volts in the lights in my Court, it is obvious to me that a two-volt change is of little importance. The Board of Trade sanction a change of four volts up and four volts down.

In my opinion, the point taken up by the Defendants is fatal to the Plaintiff's case, and the complete specification as it now stands does not claim the same invention as the provisional. I might stop here, but as others may not agree with me I shall give judgment also upon some of the other points raised. [His Lordship dealt with other points of the case, and concluded as follows:—]

I have now held that the patent is bad upon the ground that the complete specification does not conform with the provisional, upon the ground that the invention as described cannot be made to work, and also upon the ground that, if it could, no sufficient information is given as to how it was to be made to work; and I have stated my reasons fully for so holding. It is not necessary to give any further judgment in the case, but, had the Plaintiff been able to surmount the above-mentioned difficulties, and had

A. L. SMITH, J.

1892

LANE FOX v. KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY.

he established that by his invention he could have brought about what the Attorney-General said he could, my judgment would have been that his invention was the subject-matter of a patent, that it had not been anticipated, and that the Defendants had infringed it.

I give judgment for the Defendants with costs.

Solicitors for Plaintiff: *Vandercom, Hardy, Oatway, & Doulton.*
Solicitors for Defendants: *Deacon, Gibson, & Medcalf.*

F. E.

In re MICHELL.
MOORE *v.* MOORE.

STIRLING, J.
1891
Oct. 28, 29.
1892
Jan. 28.

[1891 M. 787.]

Will—Limitations in Strict Settlement—Name and Arms Clause—Cesser of Life Estate—Estate pur autre vie—Special Occupant.

Under a will, an estate and certain funds and securities stood limited to the use of *A.* for life, with remainder to the use of his second and other subsequent sons successively in tail male, with remainder to his first son in tail male. By a name and arms clause in the will, upon failure by any tenant for life to comply with the clause, his estate was to go over to, or in trust for, the person next beneficially entitled, as if such tenant for life were dead; and the trustees to preserve the contingent remainders were to pay the rents to the persons to whom they would be applicable if such tenant for life were dead, and so that his issue entitled in remainder might be entitled to the rents during his life.

A. failed to comply with the clause, and the estate went over to his only son *B.*, who had previously executed a disentailing deed.

B. died during *A.'s* lifetime, intestate and without issue, and leaving a widow.

A. (who was eighty-five years of age) was the heir-at-law, sole next of kin, and legal personal representative of *B.*

At the time of *B.'s* death, he was, in the events which had happened, beneficially entitled to an equitable estate *pur autre vie* during *A.'s* life, determinable on the birth of a second son to *A.*, and also to an estate in fee simple in remainder expectant upon *A.'s* death without having a second son:—

Held, first, that *A.* took the rents of the real estate as special occupant, and the income of the funds and securities as legal personal representative of *B.*, and consequently, that during *A.'s* life, and as long as he had no second son, the income of the funds and securities formed part of *B.'s* personal estate, while the rents of the real estate did not:

Held, secondly, that the widow of *B.* was not entitled to dower.

THE testatrix, *Anne Michell*, by her will, dated the 31st of July, 1843, devised certain freehold and copyhold estates in the county of *Wilts*, and all other her freehold and copyhold estates, subject and chargeable with certain annuities thereinafter charged thereon, to the use of her cousin, *Graham Francis Moore* (second son of *James Carrick Moore*), and his assigns for life, with remainder to his first and other sons successively in tail male,

STIRLING, J. 1892 *In re* MICHELL. MOORE *v.* MOORE.

with remainder to his first and other daughters in tail, with remainder to the use of her cousin, *John Carrick Moore* (the first son of the said *James Carrick Moore*), for life, and from and after the determination of that estate by any means in his life, to the use of trustees and their heirs during the life of the said *John Carrick Moore* upon trust for him, and to support the contingent remainders, "And from and immediately after the decease of the said *John Carrick Moore*, to the use of the second son of the body of the said *John Carrick Moore*, lawfully to be begotten, and of the heirs male of the body of such second son lawfully issuing," and for default of such issue, to the use of the third, fourth, and fifth, and every other son of the said *John Carrick Moore* successively in tail male, and, on failure of such issue, "to the use of the first son of the body of the said *John Carrick Moore*, lawfully to be begotten, and of the heirs male of the body of such first son lawfully issuing," with divers remainders over. The will then contained a name and arms clause, by which the testatrix provided and directed that "the said *Graham Francis Moore* shall within one year next after my decease, and that all and every other person and persons who, by virtue of this my will, shall become entitled to the possession or to the receipt of the rents and profits of the said hereditaments and premises hereinbefore appointed and devised, or any part thereof, and also the husband or husbands of such of them as shall be a female or females, shall within the space of one year next after he, she, or they shall severally and respectively become entitled, in his, her, or their own right, or in the right of his or their wife or respective wives, to the possession or to the receipt of the rents and profits of the said hereditaments and premises, or any part thereof, namely, as to the husband of every such female if she shall be entitled as aforesaid at the time of her marriage, then within the space of one year after such marriage, but otherwise, within one year after she shall become so entitled as aforesaid, take upon him, her, or them, and use in all deeds and writings in or to which he, she, or they shall be a party or parties, the surnames of '*Michell—Esmead*;'" and also quarter the arms of *Michell* and *Esmead*, and should, within the said space of one year, take certain steps therein mentioned to enable him, her, or them, or their

children to take and bear the said surnames and arms of *Michell* and *Esmead*; and in case any such person or persons should refuse or neglect to take or use such surnames or arms, or to take proper steps or means to enable him, her, or them so to do, for the said space of one year, then "the use, estate, or interest of the person or persons by whom or whose husband such default, neglect, refusal, or discontinuance or failure shall be made as aforesaid, shall cease and determine, and the said hereditaments and premises shall in such case immediately thereupon, go and remain to or in trust for the person or persons next beneficially entitled in remainder under or by virtue of this my will, in the same manner as if such person or persons by whom or by whose husband or husbands there shall be such neglect, refusal, or discontinuance or failure as aforesaid, being tenant or tenants for life, was or were actually dead, or being tenant or tenants in tail, was or were actually dead without issue inheritable to his or their estate or respective estates tail . . . Provided, nevertheless, that the cesser or determination of the estate of any tenant or tenants for life by virtue of the aforesaid proviso shall not operate to exclude, prevent, or prejudice any of the contingent remainders hereinbefore limited to the son or sons, daughter or daughters, of such tenant or tenants for life, or any other person or persons, but the remainder limited to the said trustees and their heirs during the life of such tenant for life respectively, or otherwise as aforesaid, shall, after such cesser or determination, take effect in possession and continue for preserving such remainders and giving them effect as they may arise, and that the said trustees and their heirs shall immediately from or after such cesser or determination, and during the suspense and contingency of such their expectant remainder, receive the rents and profits of the same premises which would belong to such tenant for life if such cesser or determination had not taken place, and shall pay the same to the person or persons for the purpose and in the manner to, for, and in which the same would be or would have been payable or applicable under or by virtue of the limitations, devises, or trusts hereinbefore contained in case such tenant or tenants for life was or were actually dead, and so that immediately after such cesser or determination the

STIRLING, J. 1892 *In re* MICHELL. MOORE *v.* MOORE.

issue of each such tenant for life entitled as aforesaid to the said hereditaments and premises in remainder immediately expectant on his decease may be entitled to the rents and profits of the said hereditaments and premises for his and their own use during the parent's life as if such parent was dead. And, in case there shall be no such issue in existence, then, during the vacancy or contingency of such issue, the person or persons next beneficially entitled for the time being under the limitations, devises, or trusts aforesaid, to the first or next vested estate or interest in remainder in the said hereditaments and premises, shall be entitled to the said rents and profits for his, her, or their own use and benefit, but without prejudice to the estate or interest of any such issue afterwards coming into existence, but only from the time of the birth of such issue respectively."

The will also contained a gift of heirlooms and a bequest of personal estate of considerable amount to be laid out in the purchase of lands to be settled to uses similar to those of the devised estates.

The testatrix died on the 19th of June, 1844; and upon her death *Graham Francis Moore* duly assumed the names and arms of *Michell* and *Esmead*, and entered into possession of the devised estates.

By a disentailing assurance, dated the 12th of October, 1872, *John Graham Carrick Moore*, the only son of *John Carrick Moore*, with the consent of *Graham Francis Moore*, then *Graham Francis Moore Michell-Esmead* (as protector of the settlement), and also of *John Carrick Moore*, granted and disposed of the devised estates to a trustee, his heirs and assigns, subject to the uses and estates limited by the said will, which were prior to the estates thereby limited to the first son of the said *John Carrick Moore*, and to the powers annexed to such preceding uses and estates, and the uses and estates limited in exercise of such powers, but freed from the estate in tail male, and all other estates tail of the said *John Graham Carrick Moore*, and all remainder to take effect after the determination or in defeazance of such estate in tail male, or estates tail, to the use of the said *John Graham Carrick Moore*, his heirs and assigns, for ever. And by the same deed the said *John Graham* also disentailed the heirlooms and

personal estate given and bequeathed by her will. The deed did not contain any declaration in bar of dower.

Graham Francis Moore Michell-Esmead, the first tenant for life under the will, died on the 8th of October, 1883, without ever having been married; and the estates and property devised and bequeathed by the will devolved upon *John Carrick Moore* as the next tenant for life. *John Carrick Moore* did not assume the surnames and arms of *Michell* and *Esmead* as directed by the clause in the will, and accordingly, upon the expiration, on the 8th of October, 1884, of the period limited by the name and arms clause, his life estate ceased and determined, and his only son *John Graham Carrick Moore* became entitled to possession and receipt of the rents and profits of the real estate, and the income of the personal estate. *John Graham Carrick Moore* had married the Defendant *Florence Mary Carrick Moore* on the 8th of February, 1872; but the settlements made upon the marriage did not affect the estates, and he died on the 10th of July, 1890, intestate and without ever having had any issue.

The Plaintiff, *John Carrick Moore*, who was eighty-five years of age and had been fourteen years a widower, was the heir-at-law, customary heir, and sole next of kin of his son *John Graham Carrick Moore*, and had taken out letters of administration to his personal estate and effects. This was an action brought by the Plaintiff against his son's widow for the purpose of ascertaining their respective rights and interests under the will of the testatrix, and the following, amongst other questions, were submitted to the Court by special case, stated pursuant to Order XXXIV. r. 1: (1.) Whether the Plaintiff was entitled to the real estate and the funds and securities which devolved as real estate settled by the will of the testatrix as the heir-at-law and customary heir of *John Graham Carrick Moore*, and as part of his real estate; (2.) whether the Defendant, as the widow of *John Graham Carrick Moore*, was entitled to any dower or freebench in respect of or out of such real estate, funds, and securities; or (3.) whether the rents, profits, and income of the real estate, funds, and securities during any and what period form part of the personal estate of *John Graham Carrick Moore*.

STIRLING, J. 1892 — *In re* MICHELL. MOORE *v.* MOORE.

During the arguments the claim of the Defendant to free-bench was withdrawn.

Buckley, Q.C., and *Swinfen Eady*, for the Plaintiff:—

The Plaintiff is entitled to the real estate and the funds and securities devolving as such under the will, and to the rents of the real estate as the heir-at-law and customary heir of *John Graham Carrick Moore*, and, as his legal personal representative, to the income of the funds and securities during his own life, subject in each case to the determination of his estate or interest by the birth to him of a second son. Under the terms of the name and arms clause, on the cesser of the Plaintiff's estate for life, *J. G. C. Moore* became beneficially entitled to the settled estate during his father's life subject to the birth to his father of a second son. In other words, he was tenant *pur autre vie*; and upon the death of a tenant *pur autre vie* during the life of the *cestui que vie*, the estate *pur autre vie* does not descend to the heir of the tenant as heir, because it is not an estate of inheritance; it devolves upon the heir of the tenant as special occupant: *Challis* on Real Property (1).

[STIRLING, J.:—According to *Burton's* Compendium (2), "the better opinion seems to be that he takes by descent."]

Estates *pur autre vie* have been called descendible freeholds; but they are not estates of inheritance. The title of the heir does not accrue by way of inheritance.

When an estate *pur autre vie* is purported to be limited to one and the heirs of his body, the special heirs do not take by descent, and the words are taken not as words of limitation, but as nominating a succession of special occupants: *Low* v. *Burron* (3). In *Northen* v. *Carnegie* (4), *Kindersley*, V.C., speaking of estates *pur autre vie*, says, "An heir, strictly speaking, can take by *descent* only an estate of *inheritance*, and it is, therefore, inaccurate to speak (though the expression is frequently used) of a descendible freehold not of inheritance. The heir in the case put takes not by *descent*; it is true he takes it because he fills

(1) Page 287.
(2) 7th Ed. pl. 731, p. 241.
(3) 3 P. Wms. 262.
(4) 4 Drew. 587, 590.

the character of heir; but he takes not as heir by *descent*, but as *special occupant*."

The most that a man can take in an estate *pur autre vie* is an estate for his own life; any one coming after him takes as occupant; and even after it was permitted to appoint by will a special occupant every one who came in after the first taker did so as an occupant, and not as deriving title through him: *In re Barber's Settled Estates* (1). In the present case, although *J. G. C. Moore* did not in terms bar the *quasi* estate tail to which he became entitled for his father's life, he had already, by the disentailing deed of the 12th of October, 1872, conveyed the real estate subject to the limitations under which the estate *pur autre vie* arose, discharged from his own estate tail and all remainders thereon, to the use of himself, his heirs and assigns; and it can scarcely be disputed that thus the estate *pur autre vie* vested absolutely in him, and that his heir has been sufficiently designated as special occupant.

Upon the question of dower the Defendant claims under the *Dower Act* (3 & 4 Will. 4, c. 105).

[STIRLING, J.:—Prior to that Act no claim could have been made in respect of an equitable estate *pur autre vie*.]

That is so; and, under sect. 2 of that Act, while a widow is made dowable out of an equitable interest to which her husband was beneficially entitled at the time of death, such interest must be, or be equal to, an estate of inheritance in possession, and must not be a joint tenancy. Now, what *John Graham Carrick Moore* was entitled to at his death was, (first) a determinable equitable estate *pur autre vie*, which is not an estate of inheritance; and (secondly) an estate in fee simple in remainder expectant on his father's death without having a second son, which, of course, was not an estate in possession; and it was not equal thereto by reason of the estate which might be interposed before it by the birth of other sons to the Plaintiff. In this case, therefore, the widow is not entitled to dower: 1 *Co. Litt.* (2); *Com.* Dig. (3); 1 *Roll.* Abr. (4). The period to which regard

(1) 18 Ch. D. 624, 627.
(2) Page 32 a, tit. Dower.
(3) Vol. iii. p. 512, A. 7, Dower.
(4) Page 676, line 43.

STIRLING, J. must be had in considering the right to dower, is the date of the death of the husband: *Flack* v. *Longmate* (1).

1892

In re MICHELL. MOORE *v.* MOORE.

Beale, Q.C., and *Upjohn*, for the Defendant:—

In this case the ordinary right of dower attaches; and, if not, the estate belongs to the administrator, and the widow will be entitled to take her share. Under the *Dower Act* a widow is dowable out of every interest in land, which is equal to an estate of inheritance, other than a joint tenancy; and if what the husband leaves is inheritable, the widow is entitled to dower. Even before the *Dower Act*, and if the estate had been legal, the possibility of an estate being interposed by the birth of a second son to the Plaintiff would not have prevented dower from attaching: *Roper* on Husband and Wife (2).

[STIRLING, J.:—The husband's interest must be equal to an estate of inheritance in possession.]

Here the interest, partly legal and partly equitable, to which *J. G. C. Moore* was entitled at the time of his death, was equal to an estate of inheritance in possession. The *Dower Act* has done away with the distinction between legal and equitable estates; and, consistently with the terms of the Act, the husband's estate need not be an estate in fee, nor a single estate; it might be one estate in possession and another inheritable estate in remainder. The mere existence of a contingency, if it does not happen, does not prevent dower from attaching; and, although the estate may be defeasible, the widow will be entitled during its continuance: *Roper* on Husband and Wife (3); *Fearne* on Contingent Remainders (4). But if dower cannot be claimed by the widow, who is entitled to the rents received by the trustees to preserve the contingent remainders? The disentailing assurance operated only upon the estate and interest of *J. G. C. Moore* under the limitations in the will, and the *quasi* estate tail to which he was entitled for the Plaintiff's life has never been barred. This being so, the 6th section of the *Wills Act* carries it to his legal personal representative; the Plaintiff takes it as

(1) 8 Beav. 420.
(2) 2nd Ed. vol. i. p. 362.
(3) 2nd Ed. vol. i. p. 369.
(4) Page 347.

administrator of his son; and, this being personal property, the widow is entitled to share: *Lingen* v. *Sowray* (1); *Harcourt* v. *Seymour* (2); *In re Skeggs' Settlement* (3); *Sisson* v. *Giles* (4); *Meek* v. *Devenish* (5).

Buckley, in reply.

1892. Jan. 28. STIRLING, J.:—

The Plaintiff in this action is the father of *John Graham Carrick Moore*, who died on the 10th of July, 1890, intestate, and without having ever had any issue, but leaving the Defendant his widow. The Plaintiff is the legal personal representative, heir-at-law, and sole next of kin of the deceased. The object of the action is to ascertain the respective rights of the Plaintiff and Defendant in certain real and personal estate devised and bequeathed by the will (dated the 31st of July, 1843) of *Anne Michell*, widow, who died on the 19th of June, 1844; and for this purpose the parties have stated a special case for the opinion of the Court. [His Lordship then stated the material portions of the will and the facts of the case, and continued as follows:—]

In the events which happened *John Graham Carrick Moore* became entitled to an equitable estate or interest during the life of the Plaintiff, determinable on the birth of a second son of the Plaintiff; and he was also entitled to a vested legal estate in fee in the same hereditaments in remainder expectant on his father's death, and the failure of the limitations to his father's second and other sons. The Plaintiff is far advanced in life, and it is extremely improbable that he will have a second son; but I need hardly say that this circumstance does not affect the rights of the parties.

The first question is, "Whether the Plaintiff is entitled to the real estate, and the funds and securities which devolve as real estate, settled by the will of *Anne Michell*, widow, as the heir-at-law and customary heir of the said *John Graham Carrick Moore*,

(1) 1 P. Wms. 172.
(2) 2 Sim. (N.S.) 12.
(3) 2 D. J. & S. 533.
(4) 3 D. J. & S. 614.
(5) 6 Ch. D. 566.

STIRLING, J. 1892 *In re* MICHELL. MOORE *v.* MOORE.

deceased, and as part of his real estate." With it may be taken the third, "Whether the rents, profits, and income of the said real estate, funds, and securities during any and what period form part of the personal estate of *John Graham Carrick Moore*, deceased."

John Graham Carrick Moore was entitled at the time of his death to an equitable estate or interest in the rents, profits, and income during the life of the Plaintiff, determinable on an event which has not yet occurred; that is, to a determinable equitable estate or interest *pur autre vie*.

The law as to the transmission of estates *pur autre vie* is marked by some peculiarities. If lands were given to *A.* for the life of *B.*, then, anciently, on the death of *A.*, the estate went to the first person who took possession, whoever he might be; and such person was known as the occupant. Lord *Coke* (1) points out how this inconvenient result may be avoided. He says: "It were good to prevent the uncertainty of the estate of the occupant to add these words, 'to have and to hold to him and his heirs during the life of the *cestui que vie*;' and this shall prevent the occupant, and yet the lessee may assign it to whom he will; or if he hath already an estate for another man's life without these words, then it were good for him to assign his estate to divers men and their heirs during the life of the *cestui que vie*." This has ever since been recognised as law, and statements to the like effect are to be found in modern treatises, as *Burton's* Compendium (2); *Challis* on Real Property (3). The special occupant, as the heir under these circumstances is called, may therefore be pointed out either in the instrument by which the limitation of the estate was originally created, or by an instrument executed by the tenant *pur autre vie*. It is to be observed, however, that the heir in such cases took as occupant, and not as deriving title through the original tenant: see *Northen* v. *Carnegie* (4); *In re Barber's Settled Estates* (5). The estate is consequently not an estate of inheritance.

Sect. 6 of the *Wills Act* provides that, where there is no special occupant of an estate *pur autre vie*, it shall go to the executor or

(1) Co. Litt. 41 b.
(2) 7th Ed. pll. 730–1, p. 241.
(3) Pages 286, 287.
(4) 4 Drew. 587.
(5) 18 Ch. D. 624.

administrator of the party that had the estate by virtue of the grant. The answer to the first and third questions put by the special case consequently turns on this: whether there is a special occupant of *J. G. Carrick Moore's* equitable estate or interest *pur autre vie*. Now, the trusts of the will applicable to the rents and profits of the real estate and the income of the funds and securities as from the 8th of October, 1884, are declared by reference to the limitations in the will subsequent to that in favour of the Plaintiff for life. The trustees to support contingent remainders, are to pay such rents, profits, and income "to the person or persons for the purpose and in the manner to, for, and in which the same would be payable or applicable under or by virtue of the limitations, devises, or trusts" in the will contained in case the Plaintiff was actually dead; and so that the issue of the Plaintiff entitled as aforesaid to the hereditaments and premises in remainder immediately expectant on his death might be entitled to the rents and profits during the Plaintiff's lifetime, as if such parent were dead; but in case there should be no such issue in existence (which event happened), then during the vacancy or contingency of such issue "the person or persons next beneficially entitled for the time being under the limitations, devises, or trusts aforesaid to the first or next vested estate or interest in remainder in the said hereditaments or premises" should be entitled to the rents and profits for his, her, or their own use and benefit. The limitation in the will applicable in the events which happened was that in favour of *J. G. Carrick Moore* and the heirs male of his body. In 1872 *J. G. Carrick Moore* executed a disentailing assurance, as he was entitled to do. Thereupon (but still by virtue of the limitations and trusts contained in the will) the subsisting limitations became, as regards the real estate, in favour of *J. G. Carrick Moore*, his heirs and assigns, and as to the funds and securities, in favour of *John G. Carrick Moore*, his executors, administrators, and assigns; and as from the 8th of October, 1884, the rents, profits, and income which would otherwise have been payable to and applicable for the benefit of *J. G. Carrick Moore* and the heirs of his body became payable and applicable to and for the benefit of *John G. Carrick Moore*, his heirs, and assigns, or *John G. Carrick Moore*,

STIRLING, J. 1892 *In re* MICHELL. MOORE *v.* MOORE.

his executors, administrators, and assigns, according to the source whence they were derived. Under these circumstances, it seems to me that on the death of *John Graham Carrick Moore*, his heir-at-law in the former case became entitled as special occupant; and that in the latter his executors or administrators became entitled, whether as special occupants or not it is unnecessary to consider.

It is said that *John G. Carrick Moore* did not bar the *quasi* estate tail to which he was entitled for the life of the Plaintiff; and it is quite true that he did not by the deed of the 12th of October, 1872, in terms deal with that estate. He did, however, convey and assure the real estate by reference to the limitations of which the title to the rents and profits of the hereditaments is determined during the life of the Plaintiff. It was not (and indeed, as between the Plaintiff and Defendant, it could not be) disputed that the estate or interest *pur autre vie* became by virtue of the disentailing assurance absolutely vested in *J. G. Carrick Moore*, both as against his own issue and as against the remaindermen; and, as it seems to me, his heir has thus been sufficiently designated as special occupant.

In my opinion, therefore, the Plaintiff takes the rents and profits of the devised real estates as special occupant, and the income of the funds and securities as legal personal representative of *John Graham Carrick Moore*, and consequently, during the life of the Plaintiff and so long as he has no second son, the income of the funds and securities forms part of the personal estate of *John Graham Carrick Moore*, while the income of the devised real estate does not.

The questions 1 and 3 must be answered accordingly.

The second question is whether the Defendant as the widow of *John G. Carrick Moore* is entitled to any dower or freebench in respect of or out of the said real estate, funds, and securities, or any part thereof.

Previously to the *Dower Act* (3 & 4 Will. 4, c. 105), a claim by the Defendant to dower out of the freeholds devised by the will of *Anne Michell* could not have been supported. Even if *John G. Carrick Moore* had been entitled at the time of his death to a legal estate to him and his heirs during the life of the

Plaintiff, his widow would not have been entitled to dower out of the freeholds: see *Low* v. *Burron* (1), the reason being that (as has been already pointed out) such an estate is not one of inheritance. Still less could the Defendant claim dower out of an estate *pur autre vie* which was equitable only. Nor could dower be claimed in respect of the estate to which *John G. Carrick Moore* was entitled in reversion.

The Defendant's present claim was accordingly based on the provisions of sect. 2 of the *Dower Act*, which runs in these terms: "When a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy) then his widow shall be entitled in equity to dower out of the same land."

It was contended that *John G. C. Moore* was at the time of his death entitled to an interest partly legal and partly equitable, "equal to an estate of inheritance in possession." Examples of interests partly legal and partly equitable which are equal to estates of inheritance in possession readily present themselves. One is that of an estate conveyed to the common uses to bar dower: viz. to the use of *A.* for life with remainder on the determination of *A.'s* estate in his lifetime to the use of *B.* and his heirs for the life of *A.* in trust for *A.* with remainder to the use of *A.* and his heirs. Another is that of an estate held under a limitation to the use of *B.* and his heirs during the life of *A.* upon trust for *A.* and his heirs, with remainder to the use of *A.* and his heirs; or under a limitation to the use of *A.* and his heirs during the life of *A.* with remainder to the use of *B.* and his heirs, upon trust for *A.* and his heirs. To such interests I apprehend that the 2nd section of the *Dower Act* would apply.

In the present case, however, the interest of *John G. Carrick Moore* consisted of two partial interests, viz., first, an equitable estate or interest during the Plaintiff's life determinable by the birth of a second son of the Plaintiff; and secondly, a legal remainder expectant on the death of the Plaintiff without having a

(1) 3 P. Wms. 262.

STIRLING,J. 1892 *In re* MICBELL. MOORE *v.* MOORE.

second son. The equitable interest in possession is severed from the estate of inheritance by the interposition of a succession of estates tail, which very possibly may never arise, but which, in my judgment, prevent the interests to which *J. G. Carrick Moore* was so entitled at the time of his death from being equal to an estate of inheritance in possession. Such interest was, at most, one which might in the event prove to be equal to an estate of inheritance. If a second son were now born to the Plaintiff, it would seem impossible that the Defendant could be entitled to dower as against him.

In my opinion, therefore, the Defendant is not entitled to dower out of the freeholds. As regards the copyholds, it was admitted during the argument that reliance could not be placed on the statements contained in the special case as to the custom of the manor of which they are held; and the claim of the Defendant to freebench was consequently withdrawn.

Solicitors: *Woodcock, Ryland, & Parker*, agents for *Isaac Cooke, Sons & Dunn, Bristol.*

W. W. K.

STIRLING,J. 1892 *Feb. 2, 24.*

In re CARDIFF SAVINGS BANK.

MARQUIS OF BUTE'S CASE.

Savings Bank—Winding-up—President — Trustee and Manager — Non-compliance with Rules—Non-attendance at Meetings—Omission or Neglect—Liability—Trustee Savings Banks Act, 1863 (26 & 27 *Vict. c.* 87), *ss.* 6, 11 [*Revised Ed. Statutes, vol. xiv., pp.* 638, 640]—*Trustee Savings Banks Act*, 1887 (50 & 51 *Vict. c.* 47)—*Companies Act*, 1862, *ss.* 165, 200 [*Revised Ed. Statutes, vol. xiv., pp.* 238, 249].

The rules of a savings bank, formed in 1819, but re-constituted under the *Trustee Savings Banks Act*, 1863, provided that the business of the bank should be conducted by a president, trustees, and managers, and that no transactions of deposit and repayment should take place without the presence of at least one trustee or manager in addition to the paid officer of the bank, and that lists of the depositors' balances should be extracted, checked and certified by the auditors, and kept open for the inspection of depositors. In the management of the bank these rules were not complied with, and their non-observance resulted in the perpetration of frauds upon the bank by its paid officer, in consequence of which the bank, in 1886, suspended payment. *B.*, who had accepted the office of president, and was so described in all the books and documents issued by the bank,

attended a meeting of the trustees and managers in 1869, and signed the minutes, but took no further part at any time in the business of the bank. He was unaware of the irregularities which had occurred, and had received copies of reports and circulars issued by the bank, which, in the opinion of the Court, justified him in believing that its affairs were being conducted in conformity with the rules, and that the accounts were duly audited. In the winding-up of the bank, under sect. 3 of the *Trustee Savings Banks Act*, 1887, the liquidator sought to make *B.* liable, for neglect or omission in complying with the rules, to contribute to the assets by way of compensation:—

Held, that omission to attend the meetings of the bank was not the same as neglect or omission of the duties which ought to have been performed at those meetings; and that under the circumstances *B.* was not liable.

ADJOURNED SUMMONS.

This was an application by the liquidator in the winding-up of the *Cardiff Savings Bank.* The bank was originally formed in 1819, and was reconstituted after the passing of the *Trustee Savings Banks Act*, 1863, under rules which were certified by Mr. *Tidd Pratt* on the 9th of November, 1863. The bank suspended payment in 1886, and was now in process of liquidation as an unregistered association under the *Trustee Savings Banks Act*, 1887 (50 & 51 Vict. c. 47), s. 3, and the *Companies Act*, 1862, upon the petition of the Commissioners for the reduction of the National Debt. The failure of the bank was brought about by the frauds and defalcations of Mr. *James Emerson Williams*, who was its actuary and paid officer from 1850 down to his death in 1886, and who had during that time abstracted about £30,000 from the funds of the bank. The official liquidator had already endeavoured to make certain of the trustees and managers of the bank liable to contribute, by way of compensation, towards making good the losses sustained by the bank, and in March, 1890, it was held by Mr. Justice *Stirling* (*In re Cardiff Savings Bank; Davies' Case* (1)) that *Davies*, a trustee and manager, who it was proved had knowledge of certain irregularities which had occurred in the management of the bank, was liable for neglect of or omission in complying with the rules and regulations required by the *Trustee Savings Banks Act*, 1863, to be adopted in the maintenance of checks, and the examination of accounts,

(1) 45 Ch. D. 537.

STIRLING, J. 1892 MARQUIS OF BUTE'S CASE.

and an inquiry had been directed as to what sums of money ought to be contributed by him to the assets of the bank in respect of such neglect or omission. In the present application the liquidator asked for a similar order against the Marquis of *Bute*.

The history of the connection of the Marquis with the bank was as follows:—The bank was originally established under the auspices of his father, the late Marquis, who, during his lifetime, occupied the position of president of the bank. He died in 1848, when the present Marquis, his only son, was an infant barely six months old. During the whole of the minority of the present Marquis he was described in the books and documents issued by the bank as "president," though he had never been formally elected as such. The Marquis attained twenty-one in September, 1868, and shortly afterwards went abroad, and did not return until the summer of 1869. Soon after his return, on the 9th of June, 1869, he attended a meeting of the trustees and managers of the bank, at which he presided and signed the minutes. With reference to this the Marquis said, in his evidence, "I cannot recollect the circumstances under which I attended the meeting, but I suppose that, happening to be at *Cardiff* at the time, it was suggested to me that I should attend, and, considering the bank as a charity and worthy of support, I acted as above stated." From that time until the stoppage of the bank the Marquis never attended a meeting, and he said, "The circumstances had so entirely faded from my recollection that I was much surprised after the stoppage of the bank to find my name connected with it." Throughout this period the name of the Marquis appeared in the copies of the rules, in the depositors' pass-books, and the annual reports issued by the bank as those of the president. Copies of these annual reports and the circulars calling the meetings were sent to the Marquis, who, however, did not remember ever having received them. His present secretary had no recollection of his having received such documents, but he stated that the Marquis was often abroad, and that his letters were opened in his absence, and only personal letters were forwarded to him.

The Court dealt with the case on the footing that these documents came to the hands of the Marquis, although he might not

have read them; and also found, as a fact, that the Marquis was ignorant of the irregularities, knowledge of which had been brought home to *Davies*.

The question for the decision of the Court, therefore, was whether the Marquis was, notwithstanding, liable for the losses sustained by the bank in consequence of those irregularities. The Marquis admitted that he was president of the bank, but contended that he was not a trustee or manager, and had never acted as such. The only rule of the bank which referred to the president was Rule 1, which provided as follows: "The affairs of this institution shall be conducted by one p resident, seventeen trustees, and thirty-seven managers, who shall have power to fill up any vacancies which may occur in their number, and appoint a treasurer."

The material provisions of the *Trustee Savings Banks Act*, 1863, and of the rules of the bank, are fully set out in the report of *Davies' Case* (1), and the only section of the Act which it is necessary here to refer to is the 11th section, which defines the liability of trustees and managers, and is as follows: "No trustee or manager of any savings bank . . . . shall be personally liable, except (1.) for moneys actually received by him on account of or for the use of such savings bank, and not paid over and disposed of in the manner directed by the rules of the savings bank; (2.) for neglect or omission in complying with the rules and regulations required by this Act, to be adopted as hereinbefore is provided in the maintenance of checks, the audit and examination of accounts, the holding of meetings and keeping minutes of proceedings thereat; (3.) and also for neglect or omission in taking security from officers as is hereinbefore provided."

For the purposes of the present application, all the facts found in *Davies' Case* (and stated in the report) as to the management of the bank, and the conduct of its affairs, were admitted.

Sir *R. E. Webster*, A.-G., *Fischer*, Q.C., and *Ingle Joyce*, for the liquidator:—

It is admitted that the Marquis was president of the bank, but

(1) 45 Ch. D. 537.

STIRLING, J. 1892 MARQUIS OF BUTE'S CASE.

he contends that he was not a trustee or manager. If that be so, he cannot claim the benefit of sect. 11 of the Act of 1863, and he stands in a worse position. By the rules of the bank its affairs are to be conducted by a president and so many trustees and managers. The president, therefore, is held out by the rules as taking part in the conduct of the affairs of the bank, and in the depositors' books the Marquis is stated to be president. That being so, he cannot be heard to say that he is not liable: *Lake v. Duke of Argyll* (1); *Waugh v. Carver* (2); *Lindley* on Partnership (3).

The Marquis cannot suggest that he has a greater protection than that given him by sect. 11 of the Act of 1863. That section is a saving clause relieving trustees and managers from liability, except for neglect or omission to comply with certain rules and regulations. If he is not a trustee and manager, then he is not entitled to any protection at all, and is liable as a contributory, under sect. 200 of the *Companies Act*, 1862.

In *Davies' Case* (4) the respondent was held liable to contribute to the assets of the bank, under sect. 165 of the *Companies Act*, 1862, and we submit that the Marquis is in a similar position.

It may be said that it is a very common thing for persons of rank to occupy positions of this sort, and never to take any active part in the business of the institution, but the bank has obtained credit on the faith of the name of the Marquis, and he having become by the constitution of the bank one of the persons liable for the conduct of its business, it would be very dangerous to exempt him from liability on any such ground.

[STIRLING, J.:—Must not the neglect or omission be personal?]

Yes; and here the Marquis has personally neglected to comply with the rules by not seeing to the maintenance of the checks thereby prescribed.

[STIRLING, J.:—It has been held under the *Companies Acts*, that mere non-feasance by a director is not enough to render him liable for the fraud of his co-directors.]

(1) 6 Q. B. 477.
(2) 2 H. Bl. 235.
(3) 5th Ed. p. 40.
(4) 45 Ch. D. 537.

Personal misfeasance is not necessary in order to render the Marquis liable. According to his contention, all the trustees and managers might escape liability simply by keeping away from the meetings and not attending to the business of the bank.

If the Marquis is not liable as a trustee or manager, we submit that he is liable under s. 200 of the Act of 1862.

[They also cited *Mahony* v. *East Holyford Mining Company* (1); *Miller's Case* (2); *Marquis of Abercorn's Case* (3); and *Rackham* v. *Siddall* (4).]

Sir *H. James*, Q.C., and *Vaughan Hawkins*, for the Marquis:—

All the facts established in *Davies's Case* (5) are here admitted, and we do not dissent from anything that was said by your Lordship in that case. There is no dilemma, because we say that *quacunque via* the Marquis is not liable. As to sect. 11, the answer is that the Marquis is not a trustee or manager, and even if he were, he would not be liable for neglect or omission within the meaning of that section.

He is not a trustee or manager in the sense that he was in a position to take part in the business in respect of which there has been default.

When it is said that credit has been given to the bank on the faith of the Marquis's name, it must be remembered that he became president when he was only six months old. On attaining his majority, in 1869, no doubt he did preside at one meeting, and one only. From that time he has never in any way directly or indirectly interfered with the management of the bank. The Marquis was a mere figure-head. By virtue of the rules, he occupied a position of limited authority, giving him no power of entering into the management of the bank.

It cannot be contended that the term "president" is included in the expression "trustee and manager."

It is said that the Marquis has held himself out as a trustee and manager of the bank. That is not enough to enable the liquidator to fix him with liability. The Marquis may be liable

(1) Law Rep. 7 H. L. 869.
(2) 3 Ch. D. 661.
(3) 4 D. F. & J. 78.
(4) 1 Mac. & G. 607.
(5) 45 Ch. D. 537.

STIRLING, J. 1892. MARQUIS OF BUTE'S CASE.

to individual depositors, but not to the liquidator who represents the whole. But we submit there has been no such holding out here. The Marquis was never held out as a trustee and manager but only as president. The depositors must be taken to have known that according to the rules the duties of management were intrusted to the trustees and managers, and not to the president, whose position is clearly defined by the rules. By the statute no liability is cast affirmatively upon the trustees and managers. It is only to be gathered from sect. 11, which restricts their liability, and under the rules the Marquis was not a trustee and manager. But assuming that he was, he could not be held liable for the omissions of his co-trustees and managers. The argument to the contrary must be carried to this extent, that even if a rota of attendance of the trustees and managers was established, yet each trustee and manager would be responsible not only for the proper discharge of his own duties when he was present at meetings, but also for the like discharge by his co-trustees and managers of their duties when they were present and he was not.

One trustee is not liable for the non-performance of duties by his co-trustee. In *Davies's Case* (1) the basis of the judgment is that *Davies* knew that the duty of proper management was unfulfilled. No authority has been cited for the proposition that the Marquis can be held liable for transactions in which he took no part and of which he had no knowledge. There is no case which goes nearly to that length. In the *Land Credit Company of Ireland* v. *Lord Fermoy* (2) the defendant took an actual part in the transactions complained of. The president cannot be said to be an officer of the company within the meaning of s. 165 of the *Companies Act*, 1862. In *Carter's Case* (3) it was held that the solicitor of a company was not an officer within that section. The Marquis is under no liability, having regard either to that section or sect. 200.

Sir *R. E. Webster*, in reply:—

The real position of the Marquis is that he is a member of an

(1) 45 Ch. D. 537. (2) Law Rep. 5 Ch. 763.
(3) 31 Ch. D. 496.

unincorporated society, in which, but for the exceptions provided by the statute, all the members are personally liable. If he is not a trustee and manager, then he cannot claim the protection of sect. 11.

"Omission" under that section is not limited to a personal omission to comply with any particular rule, but includes the omission by the trustees and managers generally to see that the rules are properly carried out, so as to maintain the safeguards provided by the Act.

STIRLING, J. (after stating the facts of the case, continued):—

It was proved in *Davies's Case* (1), that irregularities have occurred in the management of the bank in the following, amongst other, particulars:—(1.) Transactions of deposit and repayment took place without the presence of a trustee or manager in addition to the paid officer as required by sect. 6, sub-sect. 2, of the *Trustee Savings Banks Act*, 1863. (2.) No list of the depositors' balances was for some years prior to the stoppage extracted, or checked, or certified by the auditors, or kept open for the inspection of every depositor as regarded his own account, as required by sect. 6, sub-sect. 6, of the same Act. In *Davies's Case* knowledge of these irregularities was brought home to *Davies*. The Marquis of *Bute* was, in fact, ignorant of them. The question which I have to decide is whether he is, notwithstanding, liable for the loss which has arisen from them. It was in the first place contended on behalf of the Marquis that although he was president of the bank, his position was that of a mere figure-head, without any real power in the management of the business or any responsibility for its results. This contention is based on the language of the rules. Rule 1 provides as follows: "The affairs of this institution shall be conducted by one president, seventeen trustees, and thirty-seven managers, who shall have power to fill up any vacancies which may occur in their number and to appoint a treasurer." Thenceforward, in the rules, the president is not mentioned, the "trustees and managers" are alone spoken of, and it is said that on the true construction of the rules these words do not include the president, whose functions

(1) 45 Ch. D. 537.

STIRLING, J. 1892 MARQUIS OF BUTE'S CASE.

on this view would be confined to taking part in filling up vacancies and appointing a treasurer. This seems to me too narrow a construction of the rules; but I think it unnecessary to decide the question; I assume that the president is to be regarded as one of the trustees and managers. This being so, it is urged that the Marquis is relieved from liability by sect. 11 of the Act of 1863. [His Lordship then read that section and continued:—] On the other hand, the liquidator contends that the Marquis is liable for neglect or omission in complying with the regulations contained in the Act as to the maintenance of checks and the audit and examination of accounts. Sect. 11 appears to be intended to impose on each individual trustee or manager liability for his own acts and defaults, not liability for the acts or defaults of his co-trustees or co-managers. This was, to some extent at least, admitted in argument. If, for example, the trustee or manager chosen to be present along with the paid officer on an occasion of public business failed to perform his duty, it was conceded (and I think properly conceded) by the Attorney-General that the other trustees and managers (not being parties to such breach of duty) would not be liable for it. It was said, however, that on all trustees and managers alike there lay an obligation to see that the statutory provisions as to examination and audit of accounts, and particularly as to the preparation and examination of an extracted list of depositors, and the keeping such list open for the inspection of depositors, were duly complied with, and that in this respect the Marquis of *Bute* was guilty of neglect or omission. The trustees and managers of the *Cardiff Savings Bank* were (including the president) fifty-five in number. It could not be expected that each member of so numerous a body should take a very active part in the management, or attend every meeting. The directors of a trading company are only bound to use fair and reasonable diligence in the management of their company's affairs: see *In re Forest of Dean Coal Mining Company* (1). In the case of *In re Denham & Co.* (2), a director who for four years had attended no board meetings was held not to be personally answerable for fraudulent reports and balance sheets issued and passed by his co-directors or the

(1) 10 Ch. D. 450, 452. (2) 25 Ch. D. 752.

dividends paid under them. The standard of duty for an unpaid trustee or manager of a savings bank under the Act of 1863 cannot, I think, be placed higher than that of a director of a trading company, who usually receives remuneration and is a member of a much smaller body. Here the Marquis of *Bute* took no part in the conduct of the business of the bank. It may be that he neglected, as he certainly omitted, to attend the meetings to which he was summoned. But neglect or omission to attend meetings is not, in my opinion, the same thing as neglect or omission of a duty which ought to be performed at those meetings. If, indeed, he had had knowledge or notice either that no meetings of trustees or managers were being held, or that a duty which ought to be discharged at those meetings was not being performed, it might be right to hold that he was guilty of neglect or omission of the duty. That, however, is not this case. The Marquis is to be treated as having received the circulars inviting him to attend the annual meetings, and the reports issued by the bank, but not as being in a worse plight than if he had read them. Two of these reports have been put in evidence. Both refer to the accounts of the actuary (the paid officer of the bank) as having been duly audited and found correct; both record votes of thanks to trustees and managers for their attendance at the bank on days on which, according to the rules, it was to be open for receipts and payments. Any person reading these documents would naturally be led to believe that the affairs of the bank were being conducted in conformity with the rules, and in particular that the accounts were duly audited. It was part of the auditors' duty to examine an extracted list of the depositors' balances made up every year to the 20th of November, and to certify its correctness (see sect. 6, sub-sects. 6 and 7, of the Act of 1863); and no person reading these reports could suppose that that duty had not been duly performed. I think that the Marquis was entitled to rely on the trustees and managers who took part in these meetings seeing that the list was duly extracted, certified, and made available for the inspection of the depositors; just as each trustee and manager would be entitled to rely on the due performance of his duty by that one of their number who was

STIRLING, J. 1892 MARQUIS OF BUTE'S CASE.

present along with the paid officer on an occasion of public business. To hold that the Marquis was guilty of neglect or omission in respect of this duty, in the absence of any knowledge or notice that it was not duly performed, would, in my opinion, be to fix him with liability for the neglect and omission of others rather than his own. It was much pressed on me that, if this be so, all the trustees and managers might abstain from acting, leaving the business to be transacted by the officers of the bank alone, and yet escape liability. I have difficulty in seeing how this could happen without the knowledge of some at least of the trustees and managers. However this may be, it is not the present case. The affairs of the bank were, in fact, managed by some of the trustees and managers; and I do not think it necessary to inquire how matters would have stood if no trustee or manager had taken part in the conduct of the business. In my opinion, therefore, the application fails.

Solicitors for Liquidator: *Hare & Co.*
Solicitors for Respondent: *Farrer & Co.*

G. A. S.

BREWER *v.* SQUARE.

KEKEWICH, J.

1892

March 4.

[1892 B. 729.]

Practice—Mortgage—Sale by Mortgagor—Order for Sale—Reserved Price—Security for Costs—Conveyancing and Law of Property Act, 1881, *s.* 25.

Under sect. 25 of the *Conveyancing and Law of Property Act*, 1881, the Court may make an order giving leave to a mortgagor to sell the mortgaged estate out of Court, even though the mortgagee has given the mortgagor notice to pay off, and the time limited by the notice has expired, provided it appears that the sale will probably be more successfully conducted by the mortgagor; but in making the order the Court will limit the time within which the mortgagor may sell, will require a reserved price to be fixed sufficient to cover what is due for principal, interest and costs, and will further require the mortgagor to deposit a certain sum in Court as security for costs.

Woolley v. *Colman* (1), and *Davies* v. *Wright* (2), considered.

By a mortgage and deed of further charge executed in 1888 and 1889, Lady *Bisshopp*, the owner in fee of a mansion-house and estate situate in the parish of *Northam, Devonshire*, mortgaged the property in fee to *William Square*. The mortgagor died in March, 1891, £5500 being then due on the mortgage, but all interest due thereon having been paid.

On the 19th of November, 1891, the Defendants, the executors of the mortgagee, who had died, served the Plaintiffs, the executors of the mortgagor, with a notice to pay off the mortgage money, and that, if not paid within three months, they, the Defendants, would proceed to a sale in exercise of the powers for that purpose vested in them by virtue of the provisions of the *Conveyancing and Law of Property Act*, 1881, and of the mortgage securities. The mortgaged property was at present let furnished to a tenant under a lease which had about two years to run. The mansion-house was said to contain furniture and works of art of considerable value belonging to the estate of the mortgagor.

Upon receiving the above notice, the Plaintiffs, the mortgagors, attempted, but without success, to obtain a transfer of

(1) 21 Ch. D. 169. (2) 32 Ch. D. 220.

KEKEWICH, J.
1892
BREWER v. SQUARE.

the mortgage, and the notice expired on the 19th of February, 1892. The mortgagees having declined to grant any extension of time to the Plaintiffs, the mortgagors, the latter took out an originating summons against the Defendants, the mortgagees, to have an account taken of what was due to the Defendants upon the mortgage securities, and for a direction that they, the Plaintiffs, might sell the property out of Court for the purpose of discharging the mortgage debt; or, in the alternative, that the property might be sold under the Court, or the Plaintiffs let in to redeem.

The Plaintiffs now moved, on notice, for an order for sale by them out of Court, and payment of the proceeds into Court to the credit of the action; or, in the alternative, for a sale under the Court.

In an affidavit in support of the motion, the Plaintiffs, one of whom was a *London* solicitor, and the other a *London* estate agent, stated that they were acquainted with the nature and extent of the property, having recently visited it, and that they believed it to be worth upwards of £8000; that they could, after taking all proper steps by advertising and otherwise, obtain a considerable sum in excess of the mortgage money; and that they were desirous of effecting such a sale.

The Plaintiffs were represented by a *London* solicitor, and the Defendants by a solicitor residing and practising at *Bideford, Devon*, who stated in an affidavit that he was well acquainted with the mortgaged property and with the value of other properties in the neighbourhood, and had peculiar facilities for selling the property advantageously. He further stated that it was, in his opinion, of great importance to the mortgagees, now that the property was in occupation, that it should at once be offered for sale by auction, and that they should not be hampered in the conduct of the sale.

A local surveyor also stated that, in his opinion, it was doubtful whether the property would realise the amount of the mortgage money.

The property was subject to a second mortgage in favour of the bankers of the late mortgagor, and it was stated that they were willing to concur in a sale.

Warmington, Q.C., and *Methold*, for the Plaintiffs, submitted that they were entitled to an order for sale under sect. 25 of the *Conveyancing and Law of Property Act*, 1881. The second mortgagees were willing to be made parties if necessary.

Eyre, for the Defendants:—

We are desirous of exercising our power of sale vested in us as mortgagees, and our legal rights ought not to be interfered with. The general rule is, that the Court will not interfere with the exercise by a mortgagee of his legal rights, except on the terms of the mortgagor paying his mortgage money into Court: *Hickson* v. *Darlow* (1); *Hill* v. *Kirkwood* (2). The Court never interferes with a mortgagee exercising his power of sale, "unless there is something very strong": *per* Lord Justice *Cotton* in *Macleod* v. *Jones* (3). No case has been made out here for departing from the settled rule of practice; on the contrary, the evidence shews that we are the parties best qualified for carrying out the sale, for we have a representative on the spot thoroughly conversant with the property. No doubt a mortgagor may in a proper case obtain under sect. 25 of the *Conveyancing Act*, 1881, an order for sale instead of redemption; but it is not the intention of that section to take away from the mortgagee the legal rights given him by the other sections. The mortgagors have already failed to find any one who will take over the property, and to hand over the sale to them now might prejudice our position. An abortive sale would seriously damage our security, especially as it is doubtful whether it does in fact sufficiently cover our debt. If the Court should order a sale, we ask, under sect. 25, sub-sect. 3, of the *Conveyancing Act*, 1881, that the conduct of it should be given to us. Should the conduct be given to the mortgagors, they should be ordered under that sub-section to give security for costs.

KEKEWICH, J.:—

That I have jurisdiction to order a sale by the Court under sect. 25 of the *Conveyancing Act*, 1881, cannot be doubted; and

(1) 23 Ch. D. 690, 694. (2) 28 W. R. 358.
(3) 24 Ch. D. 289, 299.

KEKEWICH, J. 1892 BREWER v. SQUARE.

that I have also jurisdiction to order a sale out of Court, provided the second mortgagees are made parties to the action, so that the order may be prefaced by a declaration that all proper parties are before the Court, is in the main clear. The question is how I ought to exercise my judicial discretion.

The application before me is by a mortgagor; and the first mortgagee opposes it on two grounds, which, to my mind, are a little internecine, if I may use the expression.

The first objection is, that the Court never interferes with the legal rights of a mortgagee except upon the terms of the mortgagor paying his money into Court. That is sound as an abstract proposition, and hardly requires the citation of authorities such as *Hickson* v. *Darlow* (1) to support it. But I do not think this is an interference with the legal rights of the mortgagee. True it is that the mortgagee has given notice to pay off, and that the time limited by the notice has expired; and thus he is in a position to exercise the power of sale; but he has taken no steps to exercise the power, and I doubt whether, according to the language of the old Court of Chancery, he has "threatened or intended" to exercise the power. He has done nothing at all. The Act allows in specific terms the Court to make an order for sale, and there are no terms limiting the power of the Court so long as everything is done for the protection of all parties interested.

The other objection is that the sale will be abortive and will be injurious to the mortgagees; but if the sale by the mortgagor is abortive, I see no reason why the sale by the mortgagee is likely to be less abortive. I give credit to both parties for taking care that the sale realizes as much as possible, and the chance of an abortive sale is at least as great in the one case as in the other; therefore, the objection does not appear to be of much force. I shall require the concurrence of the second mortgagees in the sale simply because they are second mortgagees, and their concurrence is evidence that the best chance of a sale is giving the conduct of it to the mortgagor. There are reasons given in the evidence why a sale by the mortgagor is more likely to be successful, and, upon the whole, I think I should be exer-

(1) 23 Ch. D. 690.

cising my discretion rightly by allowing the mortgagor to sell; and I think the better plan would be to sell out of Court. A reserved price must be fixed sufficient to cover what is due for principal and interest and the costs of the mortgagee. Besides that, the purchase-money must come into Court, and I think the mortgagor must also deposit a sum in Court to abide any order of the Court as to costs.

Mr. Justice *Fry*, in *Woolley* v. *Colman* (1), a case which stands almost alone, and in which the conduct of the sale was allowed to the mortgagor, required him to give security for £150 to meet the costs of the sale; but Mr. Justice *North*, in *Davies* v. *Wright* (2), expressed a different view from that, saying, "I do not, however, see any reason why a mortgagor, who is going to sell himself, should give security for the costs of the sale. He will have to pay the costs, and the mortgagee's security will not be affected." That, no doubt, to a certain extent is true. On the other hand, in the present case the mortgagor is coming here for indulgence, and also, he is a debtor who for the moment cannot pay his debt, and divers costs will be incurred which, in any event, the mortgagor will have to pay; there is a doubt whether there may be a margin, and there may be costs beyond the reserved price. I think the mortgagor must provide £100 for the costs of the sale and other proper costs.

One observation more: in my opinion, this power ought not to be exercised so as to interpose more than a moderate delay between the mortgagee and the power which he has and may want to exercise. I think, therefore, that I can only give the mortgagor liberty to sell within three months from to-day. If he fails to do so within that time, then I think all the powers of the mortgagee should revive without any prejudice from the present order.

Solicitors: *W. Brewer; Minet, Harvie, Smith, & May*, agents for *Rooker & Bazeley, Bideford.*

(1) 21 Ch. D. 169. (2) 32 Ch. D. 220.

G. I. F. C.

KEKEWICH, J.

1892

March 16.

In re J. & J. HOPKINSON'S TRADE-MARKS.

Trade-mark—Registration—"Special and Distinctive Words"—Name of Individual or Firm—Trade Marks Registration Act, 1875, *s.* 10—*Patents, Designs, and Trade Marks Acts*, 1883–8, *s.* 64.

Where the name of an individual or firm printed in ordinary or ornamental type has been used as a trade-mark for goods before the 13th of August, 1875, indicating the goods as having been sold or manufactured by that particular individual or firm, it may properly be registered as a "special and distinctive word or combination of letters used as a trade-mark before the 13th of August, 1875," within sect. 10 of the *Trade Marks Registration Act*, 1875, or sect. 64, sub-sect. (ii.), of the *Patents, Designs, and Trade Marks Act*, 1883.

MOTION.

The firm of *J. & J. Hopkinson* had for many years carried on business as manufacturers of pianofortes in *New Bond Street, London.*

On the 14th of December, 1881, they applied for and obtained registration under the *Trade Marks Registration Act*, 1875, of three trade-marks, Nos. 27,234, 27,235, and 27,236, in class 9, for pianofortes. No. 27,234 consisted of the name "*J. & J. Hopkinson,*" in ordinary capital type, and was claimed as having been used for thirty-three years before the 13th of August, 1875. No. 27,235 consisted of the name "*J. & J. Hopkinson, London,*" in old English type, and surrounded by scroll-work arranged in the form of a horizontal elongated oval, and was claimed as having been used for twenty-four years before the 13th of August, 1875. No. 27,236 consisted of the name "*J. & J. Hopkinson, London,*" in old English type, with a few flourishes, and inclosed in a plain horizontal oval border-line, and was claimed as having been used for thirteen years before the 13th of August, 1875.

On the 28th of January, 1888, Messrs. *Hopkinson* applied for and obtained registration under the *Patents, Designs, and Trade Marks Act*, 1883, of two more trade-marks, Nos. 72,185 and 72,186, in class 9, for pianofortes. No. 72,185 consisted of the name "*Hopkinson,*" in ordinary capital type, and was claimed as

having been used for forty years before the 13th of August, 1875. No. 72,186 consisted of the name "*Hopkinson, London,*" in same type, and was claimed as having been used for twenty-nine years before the 13th of August, 1875.

In practice Nos. 27,235 and 27,236 were printed in black and gold from blocks belonging to Messrs. *Hopkinson* and affixed to the "fall" of the pianos. Nos. 27,234, 72,185, and 72,186, were punched, from blocks belonging to Messrs. *Hopkinson,* on the interior wood-work of the pianos.

In 1891 Messrs. *Hopkinson* brought an action for infringement of their marks Nos. 27,235–6 against a Mr. *John Hopkinson,* a pianoforte dealer, who had placed the name "*J. Hopkinson, London,*" surmounted by the Royal arms and surrounded by scroll-work, the whole arranged in the form of a horizontal elongated oval, and printed in black and gold, on the falls of his pianos. The action was tried in the Queen's Bench Division in January, 1892, and a verdict was found and judgment given in favour of the Plaintiffs. The Defendant gave notice of motion for a new trial.

On the 6th of February, 1892, the Defendant gave notice of motion to rectify the Register of Trade Marks by expunging all the Plaintiffs' five registered marks. Affidavits were filed on both sides, and a letter written by the Registrar of Trade Marks was put in evidence, which stated that since the passing of the Act of 1875 down to the present time it had been the practice in the office to accept for registration surnames or names of persons or firms in ordinary type under the provision in the successive Acts of Parliament authorizing the registration of any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of the Act of 1875, and it was also proved that a considerable number of such names had been registered as old trade-marks.

Moulton, Q.C., and *Israel Davis,* for the motion:—

Taking the two marks registered in 1888 first, that is to say, the names "*Hopkinson*" and "*Hopkinson, London,*" printed in ordinary capital type (Nos. 72,185 and 72,186), we do not dispute that, on the evidence, these words were used as trade-marks

KEKEWICH, J.
1892
In re J. & J. HOPKINSON'S TRADE-MARKS.

before 1875; but we say that these never have been and cannot be "special and distinctive words." It is clear that they are not "printed in some particular and distinctive manner" within the earlier part of sect. 10 of the Act of 1875; so that the Respondents must rely on the provisions in favour of old marks. It is not a question of printing; it is the word itself which is claimed: *In re Leonard & Ellis's Trade-mark* (1); and the result is that the right in the name "*Hopkinson*," so long as the registration remains, is absolute, and that no person of that name can use it in connection with pianos, even if he puts other distinguishing marks with it. Such an attempt to monopolize a name is contrary to the spirit of the decisions in *Burgess* v. *Burgess* (2) and *Turton* v. *Turton* (3). Those cases shew that a man is not to be interfered with in the honest use of his own name. Consequently, before the Act of 1875, although the Respondents used their name as a trade-mark, any other *Hopkinson* could do the same, and that prevents the name from being a special and distinctive word. Even if it could be called "distinctive," it was certainly not special.

Warmington, Q.C., and *Sebastian*, for the Respondents, Messrs. *J. & J. Hopkinson*:—

We do not say that these names could be registered as new trade-marks, as special and distinctive printing would be required; but we say that they were used as trade-marks before 1875, and that they are special and distinctive. That question is, in the case of marks used before 1875, a question of evidence: *In re Van Duzer's Trade-mark* (4); and the evidence here is clear that the words were and are special, being distinctive of the Respondents' pianos. This was so in fact, and that fact will be recognised by the Court. In *Richards* v. *Butcher* (5), Mr. Justice *Kay* said (6): "What does a 'trade-mark' mean? The essence of a trade-mark is that it is some distinctive thing which points out that the goods are the goods of *A. B.* How could you point them out to be the goods of *A. B.* better than by putting

(1) 26 Ch. D. 288.
(2) 3 D. M. & G. 896.
(3) 42 Ch. D. 128.
(4) 34 Ch. D. 623, 635.
(5) [1891] 2 Ch. 522.
(6) Ibid. 536.

A. B.'s name upon them?" *Ainsworth* v. *Walmsley* (1), and Lord *Cranworth* and Lord *Kingsdown's* observations in *Leather Cloth Company* v. *American Leather Cloth Company* (2), shew that these marks were good trade-marks before the Act. Consequently Messrs. *Hopkinson* had a right of property in them: *McAndrew* v. *Bassett* (3); and the Court is being asked to limit the provision in the Act which was intended for the protection of old trade-mark owners, and to say that the Act has taken away their property. If there was a time when any *Hopkinson* could put "*Hopkinson*" on pianos, that time has gone: *McAndrew* v. *Bassett*; but there is nothing to prevent any *Hopkinson* from using his name in an honest way. He can even put it on pianos if he distinguishes it from the Respondents' marks. The application is, in effect, that the practice of the registry for the last sixteen years may be reversed, and the Court will be slow to do that, unless the practice is clearly wrong: *In re Hudson's Trade-marks* (4).

Moulton, in reply:—

The authorities referred to in support of the proposition that a name was a good trade-mark before 1875 all reserve the rights of other persons bearing the same name, and that is sufficient to prevent the name from being a special and distinctive word.

KEKEWICH, J.:—

I will first deal more particularly with the mark No. 72,185, consisting of the word "*Hopkinson*," in ordinary capital type. For many years—I am told forty—before 1875, Messrs. *J. & J. Hopkinson* of *New Bond Street*, or their predecessors in title, manufactured and sold pianos, and used to distinguish them in the market by the name of "*Hopkinson*." That I understand to be the effect of the evidence. According to the well-established authorities, if any other person had sold a piano as "*Hopkinson*," with that name on it and nothing else, he would undoubtedly have been liable to an injunction, and not the less so because his own name was "*Hopkinson*." The Court would have said, I

(1) Law Rep. 1 Eq. 518.
(2) 11 H. L. C. 523, 534, 538.
(3) 4 D. J. & S. 380.
(4) 32 Ch. D. 311, 320–1.

KEKEWICH, J.

1892

In re J. & J. HOPKINSON'S TRADE-MARKS.

apprehend, without the slightest doubt or hesitation, that he might call himself "*J. Hopkinson*" or "*Hopkinson & Co.*," or use any other slight addition which would be sufficient to the ordinary buyer to shew that he was not *Hopkinson* of *New Bond Street*. But Messrs. *Hopkinson's* name was a trade-mark, a property apart from the name, something which belonged to them, which gave their pianos a vendible character in the market. Then came the Act of 1875; and from thenceforward a man could not interfere with the use by others of what he called a trade-mark, unless it was registered under the Act. If the Applicant's view is right, registration is of no avail, but this Act of Parliament stepped in and said that what was the law before the Act should entirely be altered; that what was Messrs. *Hopkinson's* property up to the date of the passing of the Act should be taken away, and that they should no longer have that property. Far be it from me to say that it might not be considered to be for the public benefit that there should be such legislation, and that Parliament might not have come to that conclusion; but it has frequently been said, and I have no reluctance to say it again, that one does not presume Parliament to have been intentionally unjust; and, therefore, that is not the conclusion at which I should arrive without plain words. Is there any reason why I should arrive at such a conclusion? The 10th section of the Act of 1875 contemplates that from thenceforward the name of an individual or of a firm might be used as a trade-mark; but it provides that such name should be "printed, impressed, or woven in some particular and distinctive manner." That, however, is only as regards a trade-mark for the purposes of the Act; it does not refer to previous user at all. Then later on in the same section it is provided that "any special and distinctive word or words, or combination of figures or letters used as a trade-mark before the passing of this Act, may be registered as such under this Act." The first observation on that is that what is there described must be something quite different from "the name of an individual or firm printed, impressed, or woven in some particular and distinctive manner." It cannot be said that the name of an individual or firm was intended to be

referred to in the latter of the two clauses I have read, with the same words of limitation in respect of print, &c., as occur in the previous clause which I have mentioned. There must have been something else in the contemplation of the Legislature there; and I think the something else is to be found in the phrase "used as a trade-mark before the passing of this Act." What do the words "special and distinctive word or words" mean? Are they really anything more than declaratory of the law as it existed before the passing of the Act? That is to say, do they do more than incorporate into the statutory provisions what had existed before the Act was passed? In order to protect a trade-mark before the Act you were obliged to find not only that the words were used as a trade-mark, but that they were of such a character as might be fairly termed special and distinctive; that is to say, you were obliged to prove by evidence and satisfy the Court that the words used as a trade-mark were known in the market, and, to use Lord *Westbury's* expression in *Leather Cloth Company* v. *American Leather Cloth Company* (1), gave a "vendible" character to the articles to which they were attached, made those articles recognised as coming from a particular manufactory, and so gave them a character different from that of every other article in the trade. Therefore, it seems to me that the Legislature in the Act of 1875 did no more than adopt the language of the cases, by reducing them into a compressed form, and say really that what the Court would have held to be a trade-mark independently of the Act should now be capable of registration as a trade-mark under the Act, provided only that the mark had been used as a trade-mark before the passing of the Act.

What is the meaning of a "special" word used as a trade-mark? I think it must be intended to mean a word used as a trade-mark, which separates the article to which it is applied from all others of the same class or character—something which points out the article as standing alone, which makes the man who sees or reads the word understand that the article has a special standing, a special existence, and is not one of the general class, for instance, of pianos, but belongs to a class of a

(1) 4 D. J. & S. 137, 148.

KEKEWICH, J. 1892 *In re* J. & J. HOPKINSON'S TRADE-MARKS.

particular character. "Distinctive" is a little different. There I will not hazard my own definition, because I have one to hand in the judgment in *Richards* v. *Butcher* (1), where Mr. Justice *Kay* says: "The essence of a trade-mark is that it is some distinctive thing which points out that the goods are the goods of *A. B.*" Here we have "*Hopkinson.*" It is quite true that there may be and are many *Hopkinsons*, and no one would contend that under the present legislation you could register "*Hopkinson*" as a trade-mark. Nay, more than that, it would be extremely difficult now for Messrs. *Hopkinson*, were they to be just commencing business, to build up the reputation of their pianos so that they might be known simply by the name of "*Hopkinson.*" According to what I have been told in this case, that would be now impossible, because there are other *Hopkinsons* in the trade who are rivals and competitors, and they would make that impossible. But that is just where the strength of Messrs. *Hopkinsons*' case comes in. They established their right to the name of *Hopkinson* before others of the clan emulated them; and perhaps those others emulated them because of their great success. But, having established their right, why are they not entitled to keep it? Why are they not entitled to their reputation and the advantage of that reputation merely because somebody else now desires to trade in his own name? By all means let that somebody else trade in his own name? I am not now saying what he may or may not do; but what I do now say is that Messrs. *Hopkinson*, having registered this trade-mark, and it not having been disputed that they used this word for many years before 1875, and that their pianos were known by this name in that way, they are entitled to retain on the register the trade-mark which they have placed there.

My judgment applies also to the mark "*Hopkinson, London,*" No. 72,186.

Moulton:—

Your Lordship's decision will also govern No. 27,234, "*J. & J. Hopkinson,*" in ordinary capital type?

(1) [1891] 2 Ch. 522, 536.

KEKEWICH, J.:—

Yes.

Moulton:—

Then, as to the remaining two marks, Nos. 27,235 and 27,236, if it is contended that these marks consist of a combination of words and a device, they cannot be supported, for the scroll-work is not of a special character; but if they are defended as really consisting of the words alone, then I must admit that they are governed by your Lordship's decision.

KEKEWICH, J.:—

Subject to your argument, I shall support those marks as being special and distinctive words used as a trade-mark before the passing of the Act.

Moulton:—

Then, that being so, I do not contest the matter further.

KEKEWICH, J.:—

I will make the order in this form: The Court being of opinion that these several trade-marks are respectively special and distinctive words used as a trade-mark before the passing of the Act of 1875, and were therefore properly registered, refuse the application with costs.

Solicitors for Applicant: *Timbrell & Deighton.*
Solicitor for Respondents: *F. J. Thairlwall.*

G. I. F. C.

ROMER, J.
1891
Dec. 8, 9, 10.

BOLTON *v.* NATAL LAND AND COLONIZATION COMPANY.

[1886 B. 2055.]

Land Company — Paying Dividends out of Capital — Balance Sheet—Profit and Loss Account — Writing off Losses — Writing up Increased Value of Land.

The principal objects of a limited company were to buy, let, and sell land, and to make advances on land and the produce thereof. The articles of association provided that dividends should be paid out of net profits, and authorized the directors, if they thought fit, to create a reserve fund out of profits to meet contingencies. In 1882 the company had a bad debt of £72,000 odd, and they met this by writing up in the balance sheet of that year the value of their lands some £69,000 above cost price, and brought down such increased value into the credit side of the profit and loss account as a set-off against the bad debt, which was in this way treated as written off. In 1885 the company made a profit on revenue account, out of which the payment of a dividend was proposed.

In a shareholder's action to restrain the payment of the proposed dividend, on the ground that what was done in the profit and loss account for 1882 was wrong, that some of the company's lands had by 1885 much depreciated in value (of which there was some evidence), and that if such depreciation was debited in the profit and loss account of 1885 there would be a considerable loss and no fund available for dividends:—

Held, on the Plaintiff's evidence, and without hearing the evidence for the Defendants, that no case was made out for the interference of the Court, and that the action must be dismissed, for that, assuming what was done in the profit and loss account of 1882 was erroneous, and the company's assets in 1885 were too highly valued, so that such assets, if truly valued, would shew a considerable loss of the share capital, the company were not bound to adopt the course taken in 1882, and to bring the depreciation of 1885 into the profit and loss account of that year.

Lee v. *Neuchatel Asphalte Company* (1) followed.

THE *Natal Land and Colonization Company, Limited*, was incorporated on the 4th of December, 1860, for the following, amongst other, objects:—

"(1) The purchasing, holding, settling, building upon, or improving, managing, cultivating, planting, clearing, letting, sub-letting, farming, selling, granting, alienating, exchanging,

(1) 41 Ch. D. 1.

mortgaging, charging, or otherwise dealing with and making a profit of lands and hereditaments in the Colony of *Natal, South Africa*, and the British possessions adjacent.

"(2) The lending or advancing money upon real or personal security in the said Colony of *Natal*, or the British possessions adjacent, or upon produce of the said colony or possessions, or upon goods or merchandise, or bills of lading of goods or merchandise shipped therefrom or thereto."

The nominal capital of the company was at first £225,000, divided into 22,500 shares of £10 each. In 1863 the capital was, by special resolution, duly increased to £365,000, and in 1870 a preference share capital of £50,000 was created, bearing a preferential dividend of £8 per cent. per annum.

The material sections of the articles of association were as follows:—

"108. Whenever, in the judgment of the directors, the net profits of the company during any financial year, reckoned from the 31st day of December to the 31st day of December, both inclusive, will admit of the payment of a dividend, the directors shall in their report recommend to the ordinary meeting to make and declare a dividend upon the company's capital; and thereupon it shall be competent at such meeting to make and declare a dividend of such amount, and payable at such time as the meeting shall determine.

"109. Subject to the proviso hereinafter mentioned, all dividends shall be upon the capital of the company out of profits, and shall be at the rate of so much per share, so that the shares paid for land shall not receive, in respect of such shares, a larger dividend per share than those on which the whole amount has not been paid in cash; but if any shareholder shall have paid calls in advance, or shall have paid up in advance on his shares, he shall receive the agreed interest upon such advances, in addition to his dividend. Provided always, and it is expressly agreed, that in case any priority or preference, dividends or interest, should be attached to any shares, in accordance with the provisions of these articles, the profit thenceforth to arise shall, from time to time, in the first instance be applied

ROMER, J. 1891 BOLTON v. NATAL LAND AND COLONIZATION COMPANY.

in payment of such preference dividends or interest, and the residue of such profit shall be applied as a dividend upon the remaining capital of the company per share.

"109*a* [added in 1875]. Notwithstanding anything in the articles of association of the company contained, the board of directors may, from time to time and at such times as they shall think fit, declare and pay dividends upon the preference shares created by the company; and it shall not be necessary for the board to recommend the payment of such dividends, or take any resolution from any ordinary or other meeting of the company previous to such payment.

"112. Authorized the directors in December in each year to make a payment out of profits on account of the annual dividends, and to equalise half-yearly dividends.

"113. The directors may, if they shall think fit, before recommending a dividend, set aside, out of the profits of the company, such a sum as they think proper as a reserved fund to meet contingencies, or for equalising dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserve fund, upon such securities as are hereinafter authorized."

In 1885 the capital of the company was £389,860, divided into 34,033 ordinary shares of £10 each, and 9906 preference shares of £5 each. The company had also issued debentures to the extent of £107,400.

The Plaintiff was the registered holder of 200 fully paid-up ordinary shares in the company.

From the year 1875, down to the end of the year 1884, the directors paid dividends on the preference shares in the company. In the year 1885 they paid an interim dividend of £2 per cent. on such preference shares, and in their annual report, published on the 21st of April, 1886, they recommended to the shareholders the payment of a further dividend of £3 per cent.

Thereupon the Plaintiff commenced this action on behalf of himself and all other the shareholders of the company (other than the directors) against the company and the directors claiming

a declaration that the company had not earned any profits which were applicable for payment of the further dividend recommended by the directors to be paid on the preference shares on account of the year ending the 31st of December, 1885; an injunction to restrain the payment of the proposed dividend; and consequential relief.

The statement of claim alleged (paragraph 6) that the company had from time to time added sums amounting to £125,552 11*s.* 7*d.* to the amounts at which the real estates at *Natal* belonging to the company stood in their books, and that such additions had been made without any valuation of such estates having been made, and without any increase having taken place in the real value of the said estates. Paragraph 7 was as follows:

"By way of illustrating the sums improperly added to the value at which the said real estates stand in the books of the company, the following items may be mentioned:—

"(1.) In December, 1882, the directors found that their transactions with the *Natal Plantations Company* had resulted in a loss to the Defendant company exceeding £69,233 10*s.* 4*d.*, and they added that sum to the value at which their lands stood in the books of the company.

"(2.) The directors have for many years added the amounts paid by them for the quit rents, payable to the Government in respect of their estates at *Natal*, to the value of the said estates. The sums so added to the value of the estates amount to £16,000 and upwards.

"The defendants have also added considerable sums paid by them for the working expenses of the company to the value of the said estates."

The company and the directors, by their statement of defence, admitted that the company had made losses, and also that the directors had added the £125,552 11*s.* 7*d.* to the amounts at which the real estates at *Natal*, from time to time belonging to the company, stood in the books; but alleged that such additions were proper under the circumstances, and were not made without valuations, and that the increase appearing in the books was a real increase in the value of the estates. They further alleged

ROMER, J.
1891
BOLTON
v.
NATAL
LAND AND
COLONIZATION
COMPANY.

that the statements in paragraph 7 of the claim were misleading and untrue, and continued: "As to the so-called illustration No. 1, it is the fact that in the balance sheet for the year 1882, presented to the meeting in 1883, the following items occurred:

"'Doubtful asset, *Natal Plantations Company*, written off, £72,326.'

"And on the other side of the same account, credit was taken for the following item:

"'Additional value, lands and house properties, £69,233.'

"Such last-mentioned item was a true and fair item, and justified by the condition of the company's estates. As to the so-called illustration No. 2, it is the fact that quit rents payable to Government on farms unleased have been charged to those farms. The annual increase of their value is much more than these quit rents, which amount to one farthing per acre. When the farms have been leased the rents have been invariably found to pay a sufficiently good return to justify such addition. It is not known precisely what the sums so added amount to, and it is not admitted that such additions amount to £16,000 and upwards. As to the so-called illustration No. 3, it is admitted that considerable sums paid by the company for expenses have been added to the cost price of the estates. These expenses included breaking up and planting new land, which was considered, as it in fact is, as development and increased value, and is properly charged to capital."

Issue was joined, and this was the trial of the action.

Evidence was gone into at length on behalf of the Plaintiff It also appeared from the answer of the Defendant company's secretary to interrogatories by the Plaintiff that the values placed upon the estates of the company were such values as to the board seemed proper and fair; and that, in determining such values, the board had regard (1.) to the prices produced by such portion of the company's lands as were already sold, which had, on the average, realized more than double the amount at which they stood in the company's books; (2.) to the upset price fixed by the *Natal* Government for lands similar to or which could reasonably be compared with the company's lands; (3.) to the letters, reports, and other documents (though not being in themselves valuations)

from time to time received by the company from their general manager; (4.) to the recommendations of the general manager. There were no written valuations.

The other material facts are sufficiently noticed in the arguments.

The 2nd and 3rd objections, as to the adding of the quit rents and of the development expenses to the cost price of the company's lands, were not pressed in the arguments, which were mainly directed to the first objection.

Chadwyck Healey, Q.C., and *Methold*, for the Plaintiff:—

The quit rents and development expenses should have been charged to revenue, but the main question is whether the company is entitled to pay a dividend, having regard to the fact that its assets have wasted. A land company like this cannot, for the purpose of ascertaining profits, take into consideration a rise in the value of their assets. But in their profit and loss account for 1873 they wrote off some bad debts by entering on the credit side some £18,000 as the increased value of their lands. Then in the balance sheet of 1882 the lands of the company are stated at cost price to be £360,766 9*s.* 8*d.*, but are taken at an estimated value of £430,000, being an increase of £69,233 10*s.* 4*d.*, and this increase is brought down into the profit and loss account, and credited against a bad debt of £72,326 4*s.* 5*d.*, which is debited on the other side and treated as written off. The answers to the Plaintiff's interrogatories shew that all these valuations were made without proper advice and without the opinion of any independent experts. In the balance sheet of 1885 the lands of the company are put at £425,261, which is some £55,800 above the value placed on them for that year by our independent experts, and if this depreciation or loss is brought down into the profit and loss account of that year, as the increased value was in 1873 and 1882, there would be a very considerable loss. The company are in fact proposing to pay a dividend out of capital: *Dent* v. *London Tramways Company* (1); *In re Oxford Benefit Building and Investment Society* (2).

(1) 16 Ch. D. 344.

(2) 35 Ch. D. 502, 512.

ROMER, J.
1891
BOLTON
v.
NATAL LAND AND COLONIZATION COMPANY.

Rigby, Q.C., *Neville*, Q.C., and *Decimus Sturges*, for the Defendants:—

On the merits we believe we have a complete answer, but without going into any of our evidence we contend, by way of preliminary objection, that no case is made out for the interference of the Court. The only dividend attacked is that of the year 1885, and in that year profits were made sufficient to pay the proposed dividend. Even if all the capital had been lost before the year 1885, yet if the company in that year made profits on their trading account they are entitled to divide them by way of dividends. All that is complained of is matter of internal management, and the Court will not interfere unless it can be shewn that the company is doing something *ultrà vires* the articles. The case is entirely covered by the principle of *Lee* v. *Neuchatel Asphalte Company* (1). No company is bound to keep its capital intact and to replace all losses that have been incurred, and not to pay dividends until all those losses have been replaced.

Chadwyck Healey, in reply:—

We admit that profits were made in 1885 sufficient to pay the proposed dividend, but the company had no right to treat the valuation of their lands in 1882 as final. Assuming the valuations of 1882 to be correct, the company ought not to have divided the increased value of their lands as profit: *Lee* v. *Neuchatel Asphalte Company* (2). But if they could do so, then in subsequent years they must bring losses on capital account also into account in like manner.

[ROMER, J.:—Assume you have some evidence that the lands of the company have been too highly valued, so that the present assets will not meet the share capital, is that a ground for stopping the payment of a dividend out of profits properly earned?]

Yes; because the previous increment of the land was brought into the revenue account. Having brought the increase into the profit and loss account, they must, when the land depreciates, bring the loss into that account also. If the depreciation in

(1) 41 Ch. D. 1. (2) 41 Ch. D. 26.

1885 had been brought into the profit and loss account, there would have been a debit of some £55,000; and, therefore, no sum would have been available for dividend.

ROMER, J.:—

This is an action which seeks to restrain the Defendants from paying a certain dividend, which has not yet been paid, for the year 1885. It seeks no other relief, and is not concerned with any other dividends that have been paid by the company. Now, it appears that for the year 1885 there were profits earned sufficient to pay the proposed dividend; profits about which there could be no question that they were rightly brought in as sums available for dividend in this year. That is not in dispute; and the balance-sheet of 1885, so far as it shews on the profit and loss account these sums available for the payment of the proposed dividend, is not attacked. But what is said is this. It is said that if you look at the balance-sheet you will find that a certain value is put as against the properties of the company in *South Africa*; and this sum put in the balance-sheet as the value of these properties is, they say, in excess of the true value, and the Plaintiff produces some evidence (as to the weight to be attached to that evidence, I need not now make any remarks) to shew that in 1885 the true value of these properties was less than the value put in the balance-sheet; and then it is said that on that ground they ought to treat as a loss to be put in the profit and loss account for this year the difference between the true value, as they say, of these properties and the value placed upon the properties in the balance-sheet; and that, if that was done, then, instead of there being a profit for the year 1885 available for payment of dividend, there would be no profit at all.

It does not appear to me that the ground on which the Plaintiff bases this claim is one on which the Court can act, and say that the payment of this dividend ought to be stopped. I am not persuaded that the difference between the two values that I have referred to ought to be put against the profit and loss account in this year. The account as it stands certainly is not a fictitious account. Really all that the Plaintiff's case amounts to is this: that if his evidence be correct, some portion of the capital of the

ROMER, J. 1891 BOLTON v. NATAL LAND AND COLONIZATION COMPANY.

company has been lost—that is to say, that the assets, if truly valued, do not make good the share capital of the company; but it does not appear to me that that in itself is a ground for impeaching the profit and loss account in this balance-sheet of 1885. I think the case is covered by that of *Lee* v. *Neuchatel Asphalte Company* (1), by which, certainly, I am bound.

But, it is said, with a view of escaping from that case, that formerly this company had dealt with the increased values of these very properties as affording a ground for paying profits by placing part of the increased values of the properties over cost price to the credit of the profit and loss accounts. Now, on examination, I can only find two balance-sheets in which that can be said to have been done at all—the balance-sheet of 1873 and the balance-sheet of 1882. What was done in the balance-sheet of 1882 was this. Under peculiar circumstances the company appear to have debited to the profit and loss account the whole of the loss arising by reason of a certain debt of £72,326 odd having proved a bad debt; and they debited that loss undoubtedly in that year to the profit and loss account; but they only did that as part of a balance-sheet in which on the opposite side in that profit and loss account they put as a set-off an increase in the value of the properties in *Africa* over the cost price. That does not afford in itself a ground for holding this company bound to always bring into the profit and loss account an increase or diminution of the value of these properties, nor enable the Plaintiff to say that because an error has been committed, or a course adopted in 1882, the balance-sheet for this year must be made out on the principle he has insisted upon, or enable the balance-sheet of 1885 to be attacked by saying that the past erroneous system, if there had been a system, or what was done in 1882, should be now set right by altering the profit and loss account of this year. The only other case in which it appears that this company ever brought into the profit and loss account at all the increased values of the lands is the profit and loss account of 1873; but there the profit and loss account is made up on a very peculiar basis, and not in the way in which the profit and loss accounts have been made up in subsequent

(1) 41 Ch. D. 1.

years, so far as I can see. But, even assuming that in 1873 the company did make up their profit and loss account, bringing into the credit side of the account the increased value of their lands, I do not think that that instance, even when coupled with the instance of 1882, forms a rule by which the company is bound, or enables me to say that the mistakes which were made in the 1873 account and in the 1882 account ought now to be set right as against the profit and loss account of this year; for it appears to me, having regard to the case that I have already mentioned, it was an erroneous method of estimating their profits to have brought in as part of the profits of the year an increase, or nominal increase, of the value of their property in *Africa*. At one time at the Bar some sort of case was attempted to be made by saying that if the balance-sheet of 1882 was looked into it would be found that part of the item of £72,326, which I have alluded to, ought in any case to have been properly debited to the profit and loss account, and that this loss ought in some way to be carried in and brought into the debit of the profit and loss account in the balance-sheet of 1885. But such a case as that was not, in my judgment, fairly raised by the pleadings in this action; and, indeed, was not, as I understand it, insisted upon by the Plaintiff's counsel, and I think properly so. It follows that, in my judgment, the grounds on which it is sought by the Plaintiff to restrain the payment of the dividend out of the profits shewn by the balance-sheet of 1885 fails; and that this action must be dismissed with costs.

Solicitors for Plaintiff: *Bolton & Co.*
Solicitors for Defendants: *Harries, Wilkinson, & Raikes.*

H. L. F.

C. A.
1892
April 8.

YOUNG *v.* THOMAS.

[1890 Y. 606.]

Practice—Appeal for Costs—Costs on Judgment in Default of Defence—Rules of Supreme Court, 1883, *Orders* XXVII., *r.* 11; LXV., *r.* 1.

When a plaintiff moves for judgment in default of a defence, under Order XXVII., r. 11, the Judge, in deciding the issues between the parties, must look to the statement of claim, and nothing else; but he has the same discretion as to costs, under Order LXV., r. 1, in cases coming under Order XXVII., r. 11, as in all other cases; and the Court of Appeal will not review his discretion, even though there has been leave to appeal, unless there has been a disregard of principle or misapprehension of facts.

THIS was an appeal from a judgment of Mr. Justice *Kekewich*, by special leave, on a question of costs.

The action was brought for the purpose of obtaining a declaration that the Plaintiff was entitled to an estate in fee simple to an undivided moiety of an undivided sixth part of certain hereditaments which had been in the possession of the Defendant *Thomas* since 1868, and for an account of rents and profits.

Four other actions were brought, for a similar declaration, against the same and other Defendants, as to other undivided shares of the same hereditaments. It appeared from the allegations in the statements of claim in the various actions, that the shares claimed in four of them were valued at less than £10 each, and in the fifth at less than £15. All the actions were, by consent of all parties, transferred into the Court of Mr. Justice *Kekewich*, and ordered to be heard together. The Defendants in all the actions asked for statements of claim, but none of them put in a statement of defence.

The Plaintiffs accordingly set down the actions on motion for judgment under Order XXVII., rule 11. At the trial, the learned Judge granted the relief prayed in each of the actions; but, being of opinion that so many actions for such small amounts were unnecessary and oppressive, and not being convinced that the Defendants would not have acceded to the Plaintiffs' demands without litigation, if properly applied to, refused any of

the Plaintiffs their costs up to the hearing. His Lordship, however, gave the Plaintiffs leave to appeal on the question of costs.

The Plaintiff in this action accordingly appealed.

Cutler, Q.C., and *Oswald*, for the Appellant:—

This appeal is brought, by leave of the Judge, under sect. 49 of the *Judicature Act*, 1873, and the Court, therefore, has power to review his discretion as to costs. But we also say that the learned Judge had no jurisdiction to deprive the Plaintiff of his costs, and acted on an erroneous principle and under a misunderstanding of the facts in doing so, and therefore the case comes under the rule laid down in *In re Gilbert* (1). The judgment was obtained under Order XXVII., rule 11, which provides that if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as, upon the statement of claim, the Court or a Judge shall consider the plaintiff to be entitled to. Therefore the Court can only look at the facts as stated in the statement of claim, and if, as is admitted, the Plaintiff was entitled to the relief claimed in his statement of claim, he was entitled also to his costs, no misconduct having been imputed to him in the conduct of the suit: *Smith* v. *Buchan* (2); *Cooper* v. *Whittingham* (3); *Witt* v. *Corcoran* (4). Moreover, the learned Judge took into consideration matters which did not appear in the statement of claim, with respect to the conduct of the Plaintiff before he brought the action, which he was not warranted in doing; nor had the Plaintiff any opportunity of giving evidence upon them. If he had, he could have shewn that the learned Judge had taken an erroneous view of the facts.

Upjohn, for the Defendant, was not called on.

LINDLEY, L.J.:—

Mr. Justice *Kekewich* has given judgment in favour of the Plaintiffs in all these actions, in default of pleading by the

(1) 28 Ch. D. 549.
(2) 36 W. R. 631.
(3) 15 Ch. D. 501.
(4) 2 Ch. D. 69.

C. A. 1892 YOUNG v. THOMAS. Lindley, L.J.

Defendants; but in the exercise of his discretion he has refused to give the Plaintiffs any costs up to and including the hearing. He, however, gave the Plaintiffs leave to appeal from his judgment so far as it disallowed their costs, and the Plaintiff in this action has accordingly appealed. The appeal could not have been brought except for this leave, and we have to consider what is the duty of the Court of Appeal on hearing an appeal under such leave. It is not the duty of the Court to rehear the case; and the Court will not interfere with the discretion of the Judge unless he has proceeded in his judgment on some erroneous principle of law, and has not, in fact, exercised his discretion on the facts of the case. In the present case we have seen a note of the learned Judge's judgment, and it is clear that he proceeded under Order XXVII., rule 11, which provides that if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and "such judgment shall be given as upon the statement of claim the Court or a Judge shall consider the plaintiff to be entitled to." Upon this order, it was contended that he had no jurisdiction at all to deprive the Plaintiff, as the successful party, of his costs. But Order XXVII., rule 11, is not the only rule that must be looked at; Order LXV., rule 1, which is specifically addressed to the question of costs, must be also considered. Looking at both those rules, I am of opinion that the proper interpretation of Order XXVII., rule 11, is that, so far as the rights of the Plaintiff and the relief claimed in the action are concerned, the Judge is to look to the statement of claim, and nothing else; but, with regard to the question of costs, there is nothing in that rule to deprive the Judge of the discretion which is given him by Order LXV., rule 1; and the Judge has as much discretion in cases which come under Order XXVII., rule 11, as in any other case. There is, therefore, no want of jurisdiction in the Judge, and the point of law raised by the Appellant in that respect fails. That being so, if we were to accede to the present appeal we should be substituting our discretion for the discretion of the Judge in the Court below, which we have no right to do. Even though leave has been given to appeal, this Court will refuse to review the exercise of the discretion of the Judge. If

his judgment had proceeded on an erroneous principle, if he had not really exercised his discretion at all, there is no doubt that we could review his decision as to costs, even without leave being given to appeal, as was shewn in a recent case in the Divorce Division: *Robertson* v. *Robertson* (1); but that is not the case here. The Judge has exercised his discretion, and, there being no error in point of law, we must decline to review his decision.

BOWEN, L.J.:—

I am of the same opinion. Although, by reason of the leave given to appeal, the Court is clothed with authority to entertain the appeal, still, in considering and dealing with the appeal, the Court must proceed on the lines laid down by the *Judicature Act* and the Rules as to the discretion of the Judge in the Court below. The headnote in *In re Gilbert* (2) clearly expresses the law on this point: "Where an appeal from an order as to costs which are left by law to the discretion of the Judge is brought by leave of the Judge under sect. 49 of the *Judicature Act*, 1873, the Court of Appeal will still have regard to the discretion of the Judge, and will not overrule his order unless there has been a disregard of principle or misapprehension of facts." In the present case there was no misapprehension of facts or disregard of principle, unless the Judge had no jurisdiction in giving judgment under Order XXVII., rule 11, to deprive the Plaintiff of his costs. Unless his construction of this rule is wrong, there is no appeal from his decision. It was urged by the counsel for the Appellant that, because the Judge is bound to give judgment in the action according to the statements in the statement of claim, he cannot, in deciding as to the costs, look at anything outside the statement of claim. There is no doubt that, in determining the rights of the parties in the action, the statement of claim alone is to be looked to, and the reason of this rule is obvious, namely, that the facts stated therein are taken to be admitted by the defendant; and, as has been decided by Lord Justice *Kay* in *Smith* v. *Buchan* (3), no evidence can be admitted as to those facts. But the learned Judge was there

(1) 6 P. D. 119.

(2) 28 Ch. D. 549.

(3) 36 W. R. 631.

C. A. 1892 YOUNG v. THOMAS. Bowen, L.J.

only referring to evidence relating to the issues in the action, and to the matters alleged in the statement of claim. But in considering the question of costs, Order XXVII., rule 11, must be read in connection with Order LXV., rule 1, and there is nothing in Order XXVII., rule 11, to deprive the Judge of the discretion as to costs given him by Order LXV., rule 1, and by the *Judicature Act*. There is no reason why he should not, as regards costs, have the same power of looking at any facts outside the statement of claim as he has in other cases, where the Defendant is before him at the trial. The appeal must be dismissed.

KAY, L.J.:—

I agree, and have nothing to add.

Solicitors: *A. Young; T. White & Sons.*

M. W.

C. A. 1892 CHITTY, J. *Feb.* 3. C. A. *April* 11.

In re NEW LAND DEVELOPMENT ASSOCIATION AND GRAY.

[1891 G. 2258.]

Vendor and Purchaser — Doubtful Title — Undischarged Bankrupt — After-acquired Property — Real Estate — Intervention of Trustee — Property vesting in Trustee — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 58, 118.

A testatrix, who died in April, 1890, devised her real estate to her nephews, *W.* and *J.*, as tenants in common in fee. In October, 1890, *W.* and *J.* purported to convey this real estate to a land company, who, in May, 1891, entered into a contract for sale thereof to a purchaser. The purchaser before completion discovered, that in 1888 *W.* had been adjudicated bankrupt, and that he was still undischarged. The trustee in *W.*'s bankruptcy now intervened and claimed to be entitled to a moiety of this real estate:—

Held, by *Chitty*, J., explaining and distinguishing *Cohen* v. *Mitchell* (1), that an undischarged bankrupt cannot, even before the intervention of the trustee in bankruptcy, convey real estate acquired after the bankruptcy to a *bonâ fide* purchaser for value, so as to give a good title to such purchaser as against the trustee:

Held, by *Chitty*, J., and on appeal, that in any case the title was too

(1) 25 Q. B. D. 262.

doubtful to be forced on a purchaser, and that on that ground alone the purchaser was entitled to be relieved from his contract:

Semble, per Court of Appeal: The proposition laid down in *Cohen* v. *Mitchell* (1), viz., that until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value, in respect of his after-acquired property, are valid against the trustee, was not intended to apply to real estate.

ADJOURNED SUMMONS under the *Vendor and Purchaser Act*, 1874, raising the question whether a sale by an undischarged bankrupt of his after-acquired real estate is binding as against his trustee in bankruptcy.

By a contract dated the 20th of May, 1891, *James Gray*, as agent for and on behalf of *James Fagence*, agreed to purchase certain freehold cottages and land at *Chertsey*, in the county of *Surrey*, from the *New Land Development Association, Limited*, for £580. A deposit of £50 was paid by the purchaser on the execution of this contract.

From the abstract of title delivered by the vendors, it appeared that the property, the subject of the contract, was, by an indenture of the 27th of October, 1851, conveyed to one *Frances Shurley* in fee: that *Frances Shurley* died on the 13th of April, 1890, having by her will devised all her real estate to her nephews, *William Shurley* and *Joseph Shurley*, in equal shares, as tenants in common, and that by an indenture of the 31st of October, 1890, *William Shurley* and *Joseph Shurley* purported to convey the property to the vendors in fee.

Upon the investigation of the title, the purchaser discovered that *William Shurley* had been adjudicated bankrupt on the 5th of July, 1888, and was at the date of the execution of the conveyance to the vendors, and still continued, an undischarged bankrupt. This fact had not been discovered by the vendors when they purchased in 1890. In consequence of the inquiries made by the purchaser, the Official Receiver in the bankruptcy of *William Shurley* heard of the sale to *James Fagence*, and a correspondence ensued, in which the Official Receiver claimed a moiety of the property as *W. Shurley's* trustee in bankruptcy, declining to waive his rights, or to take any steps to enforce them, but pointing out that his title to a moiety of the property

(1) 25 Q. B. D. 262.

C. A. 1892

In re NEW LAND DEVELOPMENT ASSOCIATION AND GRAY.

appeared to be absolute, as representing the bankrupt, and one which could not be affected in any way by a summons under the *Vendor and Purchaser Act*, 1874.

On the 26th of October, 1891, the purchaser's solicitor wrote declining to complete, and asking for the return of the deposit; the vendors refused to rescind, and thereupon the purchaser took out the present summons, asking for a declaration that a good title had not been shewn, and that the vendors might be ordered to return the deposit.

The summons was heard before Mr. Justice *Chitty* on the 3rd of February, 1892.

Ingpen, for the purchaser:—

Cohen v. *Mitchell* (1) will be relied on by the vendors against me, but I say the proposition laid down there by Lord *Esher* (2), though wide enough at first sight, does not, and was not intended to, apply to real estate. The Court of Appeal were there considering the doctrine of the agency of the bankrupt for the trustee or assignees, and his carrying on business without interference by the trustee; *Herbert* v. *Sayer* (3) was particularly under consideration, and that was a question of agency, where it was held that the bankrupt acquired property and contracted for the benefit of the assignees; but that until they interfered, all his acts were valid. The cases then under consideration, and those that establish this doctrine about the intervention of the trustee, [illegible]y deal with goods and chattels, *choses in action*, and money [illegible]d in carrying on a business; none of them in any way deal with real estate. Mr. Justice *Cave*, in *Ex parte Woodthorpe* (4), considered that *Cohen* v. *Mitchell* applied only to cases whether the bankrupt was carrying on business. If the trustee lies by he will be bound in such cases, but that class of cases and *Pickard* v. *Sears* (5) does not apply to realty. The legal estate in a moiety is therefore still outstanding in the trustee, and a good title to the whole is not shewn, and cannot be obtained, for the trustee declines to concur.

(1) 25 Q. B. D. 262.
(2) Ibid. 267.
(3) 5 Q. B. 965.
(4) 8 Morrell, 236.
(5) 6 A. & E. 469.

Even if I am wrong on this point, then I say this is not such a title as can be forced on a purchaser: *Fry* on Specific Performance (1), *In re Thackwray and Young's Contract* (2); the purchaser would certainly be buying a lawsuit.

Horace Kent, for the vendors:—

No such inference can be deduced from *Cohen* v. *Mitchell* (3) as is contended for by the purchaser, viz., that it was not intended to apply to real estate. The Master of the Rolls speaks of "property," which by sect. 168 of course includes real estate; so does Lord Justice *Fry*; and they both say the bankrupt can deal with his after-acquired property till the trustee intervenes. Had the trustee intervened before the conveyance of October, 1890, he would have prevented the bankrupt from conveying his moiety, but after conveyance it is too late: *Ex parte Dewhurst* (4). Property acquired by a bankrupt after his bankruptcy does not absolutely vest in the trustee, though he may have a right to claim it: *Drayton* v. *Dale* (5). Sect. 54 vests in the trustee only the property that the bankrupt has at the time of adjudication.

[Chitty, J.:—Sect. 44 defines "property of the bankrupt" to be "property of the bankrupt divisible amongst his creditors," and states that that shall consist of after-acquired property.]

But sect. 44, as interpreted by the decisions, does not vest the after-acquired property in the trustee till he intervenes. The legal estate in this moiety vested therefore in *W. Shurley* on his aunt's death, and was duly [illegible] for value by him to the vendors; the trustee's intervention came too late. The title is a good one, and can be forced on the purchaser.

Ingpen, in reply, asked that he might have a charge on the interest of the vendors for his deposit, and costs similar to that given in *Turner* v. *Marriott* (6).

Chitty, J. (after stating the facts, continued):—

The trustee in *William Shurley's* bankruptcy did not intervene before the execution of the conveyance to the vendors, or before

(1) 2nd Ed. 388.
(2) 40 Ch. D. 34.
(3) 25 Q. B. D. 262.
(4) Law Rep. 7 Ch. 185.
(5) 2 B. & C. 293.
(6) Law Rep. 3 Eq. 744.

C. A. 1892 *In re* New Land Development Association and Gray. Chitty, J.

the present contract was entered into, but he has intervened before the sale to the present purchaser has been completed by conveyance, and now claims to be entitled to one moiety of the property, and has asserted his title emphatically, in a letter in which, amongst other things, he says that his position cannot be affected in any way by any proceedings under the *Vendor and Purchaser Act*, 1874. The vendors, however, insist that they are nevertheless in a position to force this title on the purchaser, and in effect they ask the Court so to decide.

The claim of the trustee in bankruptcy depends on sects. 44 and 54 of the *Bankruptcy Act*, 1883, and on the interpretation section (168), which defines "property" as including land and every description of property, whether real or personal. Sect. 54 is the vesting section, which provides, that "the property of the bankrupt" shall immediately vest in the Official Receiver until a trustee is appointed, and on the appointment of a trustee shall forthwith pass to and vest in the trustee. What is to vest, therefore, is, "the property of the bankrupt," and turning back to sect. 44, I find, that "the property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt," is to consist amongst other things of (1.) "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." I stay here to notice Mr. *Kent's* argument, that sect. 54 vests in the trustee only the property of the bankrupt at the time of the adjudication. I do not think that argument can be maintained, because sect. 44, as I have already stated, defines the "property of the bankrupt divisible amongst his creditors," and expressly inserts the words "and in this Act referred to as the property of the bankrupt," so that it is quite clear that the phrase "property of the bankrupt," in sect. 54, is explained and defined by the words of sect. 44, so as to include after-acquired property. Reading these three sections without referring to any of the authorities, it seems clear that a moiety of this real estate, which devolved upon the bankrupt *W. Shurley* before his discharge, is after-acquired property which vested in the Official Receiver as trustee. But it is unquestionable that there has been a series of decisions

on this Act, and on similar earlier Acts, which shew by judicial interpretation, that the language of the Legislature as to the after-acquired property of the bankrupt is not to be read exactly as it stands—in other words, the Courts have decided that there are exceptions from the property which *primâ facie* ought to vest in the trustee as after-acquired property; the decisions include, money earned by a bankrupt in carrying on a business; they include *choses in action*, and other personal estate belonging to the bankrupt, and goods and chattels; but I know of no decision that the principle upon which these authorities are founded includes real estate. There have been bankruptcy Acts in existence for the last fifty years or more, substantially to the same effect as the present Act, and yet there has been no decision as to real estate, and no suggestion, as far as I am aware, in any of the decisions on after-acquired property, that real estate stands in the same position as goods and chattels, money earned in a business, or other property, in regard to which the authorities have established, what I may for convenience call, an exception from the general rule. As examples, I may mention that the Act of 6 Geo. 4, c. 16, ss. 63, 127, and the Act 1 & 2 Will. 4, c. 56, s. 26, contain provisions which for all practical purposes are the same as these in the Act now before me.

The leading authority as to goods and chattels and the like is *Cohen* v. *Mitchell* (1). The exact point which the Court was called on there to decide was, whether the principle of the earlier authorities applied to certain agricultural machines, which the bankrupt had dealt with in the course of his business, and the decision was, that it did. Lord *Esher* states the principle deducible from the earlier authorities in this way (2): "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." If that proposition is to be read literally, and the term "property" is to be taken as including land and real estate as defined by the *Bankruptcy Act*, 1883, s. 168, no doubt the wording is wide enough to cover the

(1) 25 Q. B. D. 262. (2) 25 Q. B. D. 267.

C. A. 1892 *In re* NEW LAND DEVELOPMENT ASSOCIATION AND GRAY. Chitty, J.

present case. But it is a fair observation to make on all *dicta* of this kind, that they are enunciated with reference to the particular question then before the Court; and having read all the judgments in that case, I am unable to say that the attention of the Lords Justices was directed to the question of real estate or land. The Court of Appeal was not laying down a new rule, but merely summed up in a convenient form the result of the prior decisions to which they had been referred, among which, as I have already stated, no decision as to real estate can be found. Lord *Esher* mentioned *Herbert* v. *Sayer* (1), and Lord Justice *Fry* referred in detail to the same decision, quoting a considerable portion of the judgment. He says (2): "The bankrupt, therefore, clearly takes some kind of interest in the after-acquired property." And then he quotes the words of the Lord Chief Justice of the Common Pleas (3): "The effect of the statutory enactments may be, either to transfer immediately such property or contracts from the bankrupt to the assignees, vesting the property in the bankrupt for an instant only, or to give the assignees the beneficial interest, and to make the bankrupt acquire property or contract for their benefit only, in the nature of an agent." Lord Justice *Fry's* own words (4), that "dispositions of personal or other property made by the bankrupt to a person who receives them in good faith and for value, must be valid," might, if they stood alone, be sufficient to include real estate, because he speaks of dispositions of "personal or other property"; but I repeat, having gone carefully through the case and the judgments, I cannot find a suggestion anywhere that the attention of the Lords Justices was drawn to the case of real estate. It appears to me that there is the greatest difficulty in applying the principle of that decision to the case now before me. Mr. *Kent's* argument is, that the legal estate in a moiety of this property passed to *William Shurley*, the bankrupt, on the death of Mrs. *Shurley*, and remained vested in him till the sale in October, 1890, and that, as he parted with his interest before the trustee intervened, the vendors have the legal estate, and the trustee takes nothing. The difficulty of maintaining this propo-

(1) 5 Q. B. 965.
(2) 25 Q. B. D. 268.
(3) 25 Q. B. D. 269.
(4) Ibid. 270.

sition is obvious, because we are dealing here with real estate. The Act of 1890 says nothing about the intervention of the trustee, which is a principle that has sprung up from the judicial interpretation of the various bankruptcy Acts; but the argument really amounts to this, that after-acquired real estate vests in the bankrupt, and remains vested in him till the trustee, by oral request or by a letter, intervenes and claims it; and thereupon the legal estate shifts and passes to the trustee. It was not suggested that any conveyance is necessary; it is said that the legal estate passes by virtue of the statute, by an assurance hitherto unknown to the law—*i.e.*, on an oral request, possibly verified by statutory declaration, or by virtue of a letter, which, as a record of the transaction, would have to be preserved as a document of title. I think this is too wide a departure from the words of the Act of Parliament, and too wide a deduction from the authorities, and that I am not justified in holding, for the first time, that the legal estate would shift in the manner suggested by the vendors. The authorities have not, in my opinion, established any such proposition as that to which the vendors have had recourse to make out their title. I do not say that if the trustee had not intervened, *W. Shurley* might not have received the rents of his share of this property in the meantime. I only say that I see no justification in the statute, or the authorities, for holding that the legal estate will first vest in the bankrupt, and then shift to the trustee when he intervenes.

If I were satisfied that the Court of Appeal intended to decide this question in *Cohen* v. *Mitchell* (1), though only by way of *dictum*, I might consider myself bound to adopt the proposition laid down by them; but, as I have already stated, I do not think the Lords Justices considered that they were dealing in any way with real estate.

But, even supposing my opinion on the first objection—*i.e.*, as to the legal estate—could not be maintained, and that the proposition in *Cohen* v. *Mitchell* did apply to the present case, still I am of opinion that this is not such a title as could be forced on a purchaser. Plainly, there is every probability of litigation ensuing against this purchaser if he completes his

(1) 25 Q. B. D. 262.

C. A. 1892 *In re* New Land Development Association and Gray. Chitty, J.

purchase—"a reasonable decent probability of litigation," as Baron *Alderson* has called it; the trustee in bankruptcy would not be bound by any decision on this summons; indeed, he has emphatically declined to be bound by these proceedings, and if I were to decide in favour of the vendors, I should be compelling the purchaser to buy a lawsuit. I ought to observe that Mr. Justice *Cave*, in *Ex parte Woodthorpe* (1), which has been quoted to me, stated as a *dictum* that he thought the proposition in *Cohen* v. *Mitchell* (2) related to cases in which the bankrupt was carrying on business without interference by the trustee; and he, therefore, considered that *Cohen* v. *Mitchell* was not intended to have so wide an operation as the vendors in this case have contended that it has. The result, therefore, is, that I think the purchaser is entitled to the declaration he asks, and to an order for the return of his deposit, with the costs of the investigation of title, and to a charge on the estate and interest of the vendors for this deposit and costs. I add, that I offered at the opening of the case to allow the summons to stand over that the trustee in bankruptcy might attend, but this offer was declined by the vendors.

W. C. D.

C. A.

From this decision the vendors appealed. The appeal came on for hearing on the 11th of April, 1892, when it was stated that, pending the appeal, the Official Receiver in the bankruptcy of *William Shurley* had commenced an action against the vendors for the recovery of a moiety of the land which *William* and *Joseph Shurley* had purported to convey to them.

Horace Kent, for the Appellants:—

The question raised is whether an undischarged bankrupt can make a title to his after-acquired real estate where the trustee has not intervened: the authorities establish an exception certainly with regard to personal property, and I contend that *Cohen* v. *Mitchell* establishes the exception with regard to real estate also.

[Kay, L.J.:—There is this essential difference between real and

(1) 8 Morrell, 236. (2) 25 Q. B. D. 262.

personal property, that where a bankrupt is carrying on business and dealing with personal property, such dealing may, and probably will, to some extent consume it. And if the trustee looks on and does not intervene, then the consumption of the property goes on as a consequence of the carrying on of the business by the bankrupt. But what has that to do with real estate ?]

No doubt some of the cases proceed on that principle; but some of the authorities I propose to cite, and particularly *Cohen* v. *Mitchell* (1), seem to be wide enough to include real estate.

[Lindley, L.J.:—The doctrine has been familiar to us for a good many years, and no doubt there is some sense in it as to personal estate. But I have never yet heard it suggested by anybody that it had the slightest application to real estate which passes by conveyance, and not by delivery.]

In *Meux* v. *Smith* (2), which was cited in *Cohen* v. *Mitchell*, a bankrupt created a valid equitable charge on his real estate, notwithstanding the fact that he was undischarged at the time; and it appears from *Ex parte Bolland* (3), that in some circumstances a bankrupt can convey the legal estate.

[Kay, L.J.:—In that last case the trustee was held to be estopped on the ground of his representations to the bank; in *Cohen* v. *Mitchell*, the rule you rely on was only applied for the purpose of protecting persons who had been trading with the bankrupt and dealing with personal estate.]

Had the trustee intervened before the conveyance of October, 1890, he could have prevented the bankrupt from conveying his moiety, but after conveyance it is too late: *Ex parte Dewhurst* (4).

[Bowen, L.J.:—Even if you are right on this first point, are you not asking us to force a doubtful title on this purchaser, and that, too, in the absence of the trustee, who is no party to this appeal?

Lindley, L.J.:—I do not say that this second objection is plainer than the first; but it is absolutely fatal to your appeal.]

(1) 25 Q. B. D. 262.
(2) 11 Sim. 410.
(3) 9 Ch. D. 312.
(4) Law Rep. 7 Ch. 185.

C. A. 1892

In re NEW LAND DEVELOPMENT ASSOCIATION AND GRAY.

After such an intimation from the Court, it would not be respectful for me to proceed any further.

Ingpen, for the purchaser, was not called on.

LINDLEY, L.J.:—

As there is a pending action with reference to a portion of this property, perhaps the less we say about the point of law raised by Mr. *Kent* the better. I have my own opinion about it, and I have expressed it already, and I cannot now recall what I have said; but without going any further into this first point of law, it seems to me to be hopeless to expect any Court to force this title upon a purchaser. If Mr. *Kent's* point is right, it must be upon the ground of estoppel or acquiescence, which involves controverted facts, and it would be wrong to force a title depending on such a question upon the purchaser. I do not believe in the point myself; but the other is too plain for argument. The appeal must be dismissed with costs.

BOWEN, L.J.:—

I entirely agree.

KAY, L.J.:—

So do I.

Solicitors: *John Hands*; *Beaumont, Son, & Rigden*, agents for *Paine & Brettell, Chertsey.*

W. W. K.

PERLS *v.* SAALFELD.

C. A.
1892
April 12.

[1892 P. 509.]

Restraint of Trade—Covenant not to exercise any Business without consent of Employer—Consent not to be withheld except on engaging in a rival Business—Invalidity.

The Defendant entered into an agreement with the Plaintiff, as his employer, that he would not accept another situation, or establish himself in any business, within fifteen miles of *London*, without the written consent of the Plaintiff, for a period of three years after leaving the Plaintiff's service; but such permission was not to be withheld if it could be proved to the satisfaction of the Plaintiff that the situation sought, or the business established, was not for the sale of the same class of goods as those sold by the Plaintiff:—

Held (affirming the decision of *Kekewich*, J.), on a motion for an injunction to restrain the Defendant from breaking the agreement, that the clause providing that the Plaintiff's permission was not to be withheld unless the business in which the Defendant engaged was in the same class of goods as the Plaintiff's, shewed that the restrictive clause was intended to apply to all kinds of business whatsoever, and was therefore wider than was necessary for the protection of the Plaintiff, and void.

THIS was a motion for an interim injunction to restrain the Defendant, *Adolf Saalfeld*, from carrying on business of a similar nature to that of the Plaintiff, under the following circumstances:—

The Plaintiff was an importer of oils and drugs, and agent for the sale of machines for the soap and perfumery trades, and carried on his business under the firm of *Martin Perls & Co.*, at 62 and 63, *Basinghall Street*, in the City of *London*.

By an agreement dated the 15th of February, 1887, the Plaintiff and the Defendant *Saalfeld* agreed that the Defendant should be employed by the Plaintiff as clerk, correspondent, and bookkeeper. The material clauses in the agreement were the following:

"The said Mr. *Saalfeld* agrees not to accept another situation as clerk or agent, nor to establish himself, within a radius of fifteen miles from the *London Royal Exchange*, without the written permission of the said Messrs. *Martin Perls & Co.*, for

C. A. 1892 PERLS v. SAALFELD.

a period of three years after leaving their firm, reckoned from the date whenever such event may take place. Such permission, however, is not to be withheld if it can be proved to the satisfaction of the said Messrs. *Martin Perls & Co.* that the sought for clerkship or agency is not respectively with or for a firm trading with or dealing in the same class of goods as those of Messrs. *Martin Perls & Co.*; and, further, if it can be proved that the said Mr. *Saalfeld* will, after establishing himself, deal in goods other than those of the said Messrs. *Martin Perls & Co.* for a period of at least three years.

"The said Mr. *Saalfeld* agrees lastly, in case of his breaking the aforesaid last covenants of this agreement, to make a compensation of £300 sterling to the said Messrs. *Martin Perls & Co.*"

The action was brought to restrain the Defendant from breaking the said agreement, and the Plaintiff moved before Mr. Justice *Kekewich* for an interim injunction till the trial, on affidavits alleging that the Defendant had left the Plaintiff's employment in February, 1892, and had commenced business on his own account within fifteen miles of the *Royal Exchange*, in competition with the Plaintiff and without the Plaintiff's permission.

Mr. Justice *Kekewich* refused the application, on the ground that, although the restrictive clauses in the agreement were reasonable in respect of distance and time, they were unnecessarily wide, inasmuch as they restricted the Defendant from accepting a situation in, or carrying on himself, a business of any kind without the consent of the Plaintiff. The Plaintiff appealed.

Warmington, Q.C., and *Oswald*, for the Appellant:—

The question must turn on the construction of the agreement, and in construing it we must look to the relation between the parties at the time and their reasonable intention to protect the Plaintiff. If there had been no proviso at the end of the agreement, and the agreement had been simply that the Defendant would not enter into any business within fifteen miles without the consent of the Plaintiff, the agreement would have been construed by the Court as applying only to a business in competition with the Plaintiff's business, and would have been held

good: *Avery* v. *Langford* (1); *Mills* v. *Dunham* (2). How can this proviso, which has been added in order to restrict the operation of the agreement still further, have the effect of making it too wide? An agreement of this kind is separable, and the positive part of it being good, the Court may reject the proviso, so as to carry into effect the intention of the parties: *Baines* v. *Geary* (3); *Nicholls* v. *Stretton* (4); *Chesman* v. *Nainby* (5); *Mumford* v. *Gething* (6). We have evidence to shew how the clause was understood by the parties.

[LINDLEY, L.J.:—We cannot receive such evidence for the purpose of this appeal.]

Renshaw, Q.C., and *Buckmaster*, for the Defendant, were not called on.

LINDLEY, L.J.:—

The question in this case turns upon the construction of an agreement between the Plaintiff, trading as *Martin Perls & Co.*, who are described as merchants, and are importers of oils and drugs, and agents for the sale of machines used and sold in the perfumery trade, and the Defendant, *Saalfeld*, who was about to enter their employment as corresponding clerk and bookkeeper. The important part of the agreement is this. [His Lordship read the clause of the agreement set out above, and proceeded:—]

Now, the object of that clause obviously is the same as the object of all similar clauses in such agreements, namely, to protect the employer from competition in his business. That is the object of it, but the question is what is the true construction of this clause? and, upon reflection, notwithstanding the observations made by the counsel for the Appellant, it does appear to me that the true construction of it is this: that the Defendant is not to engage in any business whatsoever without the written consent of his employer. If that is the true construction, it goes a great deal further than the reasonable protection of the interests

(1) Kay, 663.
(2) [1891] 1 Ch. 576.
(3) 35 Ch. D. 154.
(4) 7 Beav. 42.
(5) 2 Ld. Raym. 1456.
(6) 7 C. B. (N.S.) 305.

C. A. 1892 PERLS v. SAALFELD. Lindley, L.J.

of the employer would require. I do not think that the employer is at liberty to put a check upon his clerk or his servant to the extent to which this clause warrants; the employer cannot say, "You shall not go into any business at all without my consent;" he cannot make his consent a condition precedent to liberty to enter upon other employment of any sort.

The further question is, whether this clause is so cut down by what comes after as to shew that that is not the true construction; but that the true construction is, "You shall not enter into any business competing with me." If that is the true construction, it is a different matter. Now I think, looking upon this agreement as a whole, the first is the true construction; that is to say, that the employers have put upon this clerk the outside limit, and stipulated that he shall not engage in any business at all without their consent. That is plain to my mind from the words in the second portion of the clause, "Such permission is not to be withheld," and so on; that is to say, "You shall not engage in any business as clerk or agent, or establish yourself, without my written permission; but I will concede that, if it can be proved to my satisfaction that your clerkship or agency is not with or for a firm trading with or dealing in the same class of goods, you are to have my permission under those circumstances." What it really comes to is this: "You are not to start in London without consulting me, and I am to be the judge beforehand of the extent to which you are to go; but I will not withhold my permission if you prove certain things." Now, this proviso about permission is utterly unintelligible and meaningless if you construe the first part as confined to businesses which are the same as the business of Messrs. *Perls & Co.* The clause only becomes operative upon the wider construction; and if, in order to give effect to the whole, the wider construction becomes necessary, then I think Mr. Justice *Kekewich* is right in his view that this is too wide, and consequently this action cannot be maintained.

BOWEN, L.J.:—

I am of the same opinion. The first question is, What is the true construction of this agreement? I pass in one word the

point suggested by Mr. *Oswald's* argument, that it can be proved by the course taken that the final words of the last paragraph do not mean what the same words do in the previous paragraph. I do not think you can receive any such evidence for such a purpose.

What is the true construction of this agreement? There are two alternative views, and according as you take one view or the other, the appeal ought to succeed or fail. Is the true construction of this agreement that the Respondent shall not establish himself, within the limits of time and space mentioned, in any business of the same kind as that which Messrs. *Perls & Co.* are carrying on, without their permission? If such is the true meaning of this agreement, then it is not too wide, nor can it be said to be void as being in restraint of trade. The second suggested construction is as follows: that Mr. *Saalfeld* engages himself not to establish himself in any situation or business whatsoever unless and until he can satisfy his employers that the business is a different one from that in which they themselves are engaged. If the latter construction is the true construction of the agreement, then its effect is to make the employers the final court of appeal and the ultimate judges upon the question whether or no in fact the business in which the Respondent is intending to engage is or is not the same as their own.

Now, I think that, upon the consideration of this document, the latter construction alone is possible. I regret the result at which we have arrived, because it may well be that, if we were to speculate, we might surmise that it is by accident only that the agreement has been drawn so as to make this its necessary interpretation. But we are not entitled to make surmises; we have to construe documents according to the language deliberately used, and as soon as one reads the whole of the paragraph together, it seems to me that such must be the true construction. It is perfectly true that if you take the first part alone, applying to it the doctrine which has been applied in *Avery* v. *Langford* (1) and in other cases, and construing that part upon the principle of giving effect to a document, rather than of putting a construction upon it which would make it void at law, you would arrive

(1) Kay, 663.

C. A. 1892 PERLS v. SAALFELD. Bowen, L.J.

at the view that the language, although general, was meant to be controlled by the circumstances of the case, and to be read only in the sense that a situation in a business similar to that carried on by Messrs. *Perls & Co.* was not to be taken without their leave. But, as soon as you get to the further portion of the paragraph, you see that such cannot be the construction of the words without doing more violence to the context than one is justified in doing; otherwise there would be no necessity for the subsequent proviso. If the only meaning of the contract were that he was not to take a situation in the same business without their permission, there could be no meaning in adding a paragraph that they were to give that permission if the situation was in a different business. Unless, therefore, we are to strike that clause out, or to regard it as an altogether useless and abortive passage, we are driven, according to the ordinary use of language, to come to the conclusion that it really was intended by these words to make the Respondent's employers judges in the future as to whether he was setting up a similar business or not.

If that is the true construction, it only remains to be asked whether the law permits such an agreement, or whether the law declares such an agreement void. Is such a clause reasonably necessary for the protection of the employer? Can it be said to be reasonably necessary for the protection of a merchant in the City of *London*, that he should be the dominant person to decide, according to his own view, whether a future situation which is adopted, or a future business which is being set up, by his clerk, is like his own or is not? That really makes him the court of appeal over the clerk, and fetters the clerk with the necessity, not of dealing honestly with his employer, but of satisfying his employer that he is so doing. That seems to me to be too wide, and to be in restraint of trade, and therefore, with much regret, I come to the same conclusion as my learned Brother.

KAY, L.J.:—

I think it is quite established now that agreements of this kind are to be read without any bias either one way or the other, and to be construed, like all other agreements, fairly, according

to their general intention, and with reference to the state of circumstances existing at the time which must be taken into consideration in construing every written document.

Now, applying that rule of construction to this case, I find myself compelled to come to one conclusion as to the meaning of this, and, to express it, before I read the words, shortly, it is this: that this agreement means that this man, who was the clerk or agent of *Martin Perls & Co.*, was not, for three years after leaving their service, to become a clerk or agent, or to establish himself in any kind of business whatsoever, without their written permission. Certainly, they say that permission shall not be withheld if it is proved to their satisfaction that the business will not compete with theirs; but the exception makes it impossible to construe the former part of this agreement as having any limitation at all. It must, in my opinion, according to all ordinary rules of construction, apply to every sort or kind of business in which he might become clerk or agent, or in which he might establish himself. The words are these: "The said Mr. *Saalfeld*"—that is, the Defendant—"agrees not to accept another situation as clerk or agent, nor to establish himself within a radius of fifteen miles from the *London Royal Exchange*, without the written permission of the said *Martin Perls & Co.*, for a period of three years after leaving their firm, reckoned from the date whenever such event may take place." There is not in those words the slightest limit of any kind. There is no description of the business in which he is not to enter as clerk or agent at all; the words are quite general. But I entirely agree that, if it had stopped there, it would have been, according to the ordinary mode of construing contracts of this kind in furtherance of the general intention of the parties, quite legitimate, *ut res magis valeat*, to limit the meaning so as to read it "clerk or agent in a business that will compete with *Martin Perls & Co.*" But the agreement, instead of stopping there, goes on thus: "Such permission, however, is not to be withheld if it can be proved to the satisfaction of the said *Martin Perls & Co.* that the said clerkship or agency is not with or for a firm trading with or dealing in the same class of goods as those of the said *Martin Perls & Co.*" I will pause there. "Not to be withheld," means it shall be

C. A. 1892 PERLS v. SAALFELD. Kay, L.J.

given; therefore, when it is proved to the satisfaction of *Martin Perls & Co.* that the business does not compete with their own in any point, the written permission shall be given. Well, then, the Defendant cannot become a clerk in any business whatever, without the written permission, and the written permission shall be given if the business does not compete. There is no escape from it. It must mean any business; it must include businesses which do not compete. Then if you read the rest of the clause it is in similar language. The permission is not to be withheld "further, if it can be proved that Mr. *Saalfeld* will, after establishing himself, deal in goods other than those of *Martin Perls & Co.*" If he establishes himself, not as clerk or agent, but in a business of his own, still he must obtain the permission; but the permission is not to be withheld—that is, it shall be given—if it is proved that he does not deal in goods such as *Martin Perls & Co.* deal in. But he must have the written permission even then, though he does not deal in their goods. The words are so plain that, to my mind, there is no ambiguity in them. I would, if I could, put a construction upon this which would save the agreement from being void. If there were an ambiguity, I would prefer a construction which would make the agreement good rather than invalid. But there is no ambiguity. To my mind there is no possible escape from the construction that permission is to be had in every case. I say that is far too wide. It is wider than any protection the business of *Martin Perls & Co.* requires, and it is far wider than any person or firm in the position of *Martin Perls & Co.* had a right to impose upon another person in the position of this Defendant. It is restraint of trade, which is not wanted for their protection, and which I cannot conceive the law would allow in any case. I do not know—it is not for me to speculate—what the parties really intended by the words they used, except so far as the construction goes which those words necessarily bear. It has been contended that you can sever the proviso from the other part. What does that mean? A case has been referred to—*Baines* v. *Geary* (1)—in which there were words which included both customers who became such during the time the agent was employed, and

(1) 35 Ch. D. 154.

persons who might become customers after the time the agent was employed. In that case the Court said, in effect: it is true, so far as they include customers who became such after he ceased to be the agent, the covenant would be bad; but we can sever that part from the other, and we can treat the covenant as good, so far as it relates to the customers who were such while he was employed. That kind of severance I can understand, and that kind of dealing with a covenant, partly good and partly bad, has been adopted in many cases. But the two things seem to me totally different: what is proposed here is to sever a proviso from the rest of the agreement; in the other case it was dividing one covenant into parts. It is not proposed here to separate the part which is bad from the part which is good, but to separate the covenant from the proviso, which explains the meaning of the whole, and then to give a different meaning to the whole case by striking the proviso out. Such a mode of construction is not possible. There is no possibility of applying in this case that doctrine under which you can sever one part of a covenant from another, so as to save one part of it from the effect of the illegality of the other. What we have to do is to construe the meaning of the covenant, and when once we have done that, we cannot escape the conclusion that this is an agreement in terms imposing a restriction upon the Defendant very much wider than the law would allow. I think, therefore, that this judgment is perfectly right, and this appeal must be dismissed with costs.

Solicitors: *H. Bentwitch*; *J. & M. Solomon.*

M. W.

C. A.
1892
STIRLING, J.
Jan. 27;
Feb. 10.
C. A.
April 11.

In re ANGLO-AUSTRIAN PRINTING AND PUBLISHING UNION.

ISAACS' CASE.

Company—Winding-up—List of Contributories—Director's Qualification Shares—Implied Contract to take Shares.

Where a person has accepted the office of director of a company, and has acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration and benefits provided by the articles for the directors.

The articles of association of a company provided that the qualification of a director should be the holding of shares of the nominal amount of £1000, that a first director might act before acquiring his qualification but should in any case acquire it within one month from his appointment, and, unless he should do so, he should "be deemed to have agreed to take the said shares from the company, and the same should be forthwith allotted to him accordingly." Sir *H. I.* signed both the memorandum and articles of association for one share. He was appointed one of the first directors, and acted as such for more than a year; but he never applied for any shares, nor were any ever allotted to him, and he was never registered as a member of the company. There were at all times down to the winding-up of the company sufficient shares to enable an allotment of shares to the amount of his qualification to be made to him:—

Held, by the Court of Appeal (affirming the judgment of *Stirling*, J.), that Sir *H. I.* had, under the circumstances, agreed with the company to take, and that the company had agreed to allot to him, the shares which constituted his qualification as a director, and, accordingly, that he was liable to be settled upon the list of contributories in respect of that number of shares.

THIS was a summons asking that the name of Sir *Henry Isaacs* might be removed from the list of contributories of the *Anglo-Austrian Printing and Publishing Union, Limited.* The company was incorporated on the 18th of November, 1889, with a capital of £500,000, divided into £10 shares, and under articles of association, the material provisions of which were as follows:—

Art. 71. "The qualification of a director shall be the holding of shares of the company of the nominal amount of £1000. A first director may act before acquiring his qualification, but shall

in any case acquire the same within one month from his appointment, and, unless he shall do so, he shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly."

Art. 72. "The first directors of the company shall be Sir *Henry A. Isaacs* and *Horatio Bottomley* and such five other persons as shall be appointed in writing under the hands of a majority of the subscribers to the memorandum of association."

Sir *Henry Isaacs* signed the memorandum and articles of association in respect of one share. He accepted the office of director, and acted as one of the first directors. He was present at every meeting of the directors from the 24th of February, 1890, down to the 24th of March, 1891. But he never applied to the company for any shares, and he alleged that there never had been any allotment to him of a binding nature, that he had never received any notice of any allotment, and that he never knew that his name has been entered in any book whatever. It was admitted by the counsel for the Official Receiver, for the purpose of the argument, that no shares had ever been formally allotted to Sir *Henry Isaacs* or registered in his name. The company was ordered to be wound up in May, 1891. Sir *Henry Isaacs* did not dispute his liability in respect of the one share for which he signed the memorandum of association, and the question was whether he was liable to be placed upon the list of contributories in respect of the 100 £10 shares which constituted a director's qualification.

The summons was heard before Mr. Justice *Stirling* on the 27th of January, 1892.

Buckley, Q.C., and *E. S. Ford*, for Sir *Henry Isaacs*:—

In this case no shares were ever allotted to Sir *Henry Isaacs*, and the company never placed his name on any register of members. He never in terms "agreed to become a member" of the company, and no agreement on his part to become a member can be inferred from the facts. The articles of association of a company regulate its internal affairs, and constitute a contract between the shareholders *inter se;* but they do not constitute a contract between the members and the company: *Eley* v.

C. A. 1892 ISAACS' CASE.

Positive Government Security Life Assurance Company (1). It is true that the articles in this case contain a provision which has not hitherto been brought before the Court, *i.e.*, that in case a director does not acquire his qualification shares within a month, "he shall be deemed to have agreed to take the said shares from the company," but the document in which that provision occurs is not a contract between Sir *Henry Isaacs* and the company, and no other contract will suffice.

Where there is a qualification clause, it merely imposes upon the director a duty to qualify; but acceptance of the office, and continuing to act after the time when the qualification ought to have been acquired, does not amount to a contract to take the qualification shares. There must be a contract with the company to take, and by the company to give, the qualification shares: *In re Wheal Buller Consols* (2); *Onslow's Case* (3). If, indeed, there has been, as in *Ex parte Lord Inchiquin* (4), an allotment of the shares and the director has not repudiated them, then a contract is constituted. But here there is neither allotment, registration, nor contract, and Sir *Henry Isaacs* is not liable as a contributory except for one share. [They also referred to *Hewitt's Case* (5).]

Muir Mackenzie and *Arnold White*, for the Official Receiver and liquidator:—

Sir *Henry Isaacs* signed both the memorandum and articles of association; he accepted the office of first director and acted as such, and not having acquired his qualification shares he is under the express terms of article 71 (by which he is bound) to "be deemed to have agreed to take" his qualification shares from the company. The company on their part have been in a position to give them. The cases cited do not apply to such a clause as article 71, which was introduced on purpose to meet the difficulty arising from the decision in the *Wheal Buller Case*.

Buckley, in reply.

(1) 1 Ex. D. 20.
(2) 38 Ch. D. 42.
(3) 3 Times L. R. 42, 551.
(4) [1891] 3 Ch. 28.
(5) 25 Ch. D. 283.

1892. Feb. 10. STIRLING, J. (after stating the facts, continued):—

Whether any shares were ever formally allotted to Sir *Henry Isaacs*, and whether his name was ever entered on the register of the company (if such a register existed), are matters which seem scarcely to have been ascertained with all the exactness which is desirable; but the learned counsel who appeared for the Official Receiver admitted, for the purpose of the argument, that no shares had been allotted to Sir *Henry Isaacs* or registered in his name. It is not disputed that Sir *Henry Isaacs* is liable in respect of the one share for which he signed the memorandum of association, and the question which I have to determine is whether he is liable to be placed on the list as a contributory for the 100 shares constituting his qualification as a director. This depends on whether it can be inferred from the facts that he had "agreed to become a member" of the company in respect of his qualification shares within the meaning of the 23rd section of the *Companies Act*, 1862. For this purpose it must be made out that Sir *Henry Isaacs* has agreed with the company to take from the company, and that the company has agreed with him to give him, 100 shares.

The subject of the liability of a director in respect of qualification shares has often been considered. The cases are collected in the last edition of *Lindley* on Companies (1), in two long tables. Lord Justice *Lindley's* judgment in the recent case of *In re Wheal Buller Consols* (2) shews his opinion to be that the law on this point is not in a satisfactory state. It is admitted, however, that there is no case which precisely governs the present. It appears to have been the opinion of some authorities, and particularly of the late Master of the Rolls—see his observations in *Karuth's Case* (3), and *Miller's Case* (4)—that acceptance of the office of director, and acting as such director, implied an agreement on the part of the director to acquire the proper qualification. This view has not been universally accepted. The point came before the Court of Appeal, consisting of Lords Justices

(1) 5th Ed. p. 794–7.
(2) 38 Ch. D. 42.
(3) Law Rep. 20 Eq. 506, 510–11.
(4) 3 Ch. D. 661, 664.

C. A. 1892 ISAACS' CASE. Stirling, J.

Cotton, *Lindley*, and *Fry*, in *Hewitt's Case* and *Brett's Case* (1). The articles of association in that case provided as follows:— "The qualification of a director, whether hereby appointed or not, shall be the holding in his own right of shares to the nominal amount of £500, upon which all calls due have been paid." In delivering the judgment of the Court, Lord Justice *Cotton* says (2): "There is a difference of opinion between the members of the Court on the question whether the contract entered into by these directors to obtain a qualification does amount to an agreement to take shares within the meaning of the 23rd section, and in the view of this case in which we all agree it is not necessary to decide, and we think it better not to express any opinion on this point." The Court agreed that if such contract existed it was a contract, regard being had to the terms of the articles of association, to take shares within a reasonable time, and that what is a reasonable time must depend upon the circumstances of each case. Then the Lord Justice says: "Having regard to these circumstances, and to the very short time during which the company had even a formal existence, we are of opinion that, whatever, as regards the position of Sir *W. Brett* and Mr. *Hewitt* under sect. 23, may be the effect of the contract to acquire a qualification, a reasonable time for completing that contract had not elapsed before the company was wound up."

Subsequently to that time three cases, and three only, as far as they have been mentioned in argument or I can discover, have occurred in which the question has been raised; viz., *Onslow's Case* (3), *In re Wheal Buller Consols* (4) and *Ex parte Lord Inchiquin* (5). *Onslow's Case* is very shortly reported. There the articles of association provided that the qualification of a director "shall be the holding in his own right of not less than twenty-five shares." The decisions, particularly that in *Brown's Case* (6), shew that articles in this form do not impose an obligation on the director to take shares, from the company in the first instance; the director is at liberty, at all events for a time, to acquire them *aliunde*, if he can do so.

(1) 25 Ch. D. 283.
(2) Ibid. 296.
(3) 3 Times L. R. 42, 551.
(4) 38 Ch. D. 42.
(5) [1891] 3 Ch. 28.
(6) Law Rep. 9 Ch. 102.

However, Captain *Onslow*, in this case, sent in an application for an allotment to him of twenty-five shares, or any less number the directors might think fit. That appears from a statement on page 552 of the report. Only five shares were allotted to him in answer to this application, and it was held that he must be placed on the list of contributories for five only, and not for twenty-five. That case appears to me to have been decided only on its special facts, and in that observation I am confirmed by what Lord Justice *Bowen* said in the next case to which I will refer, namely, *In re Wheal Buller Consols* (1). There the articles provided (art. 89) that, "The qualification of a director shall be the holding of preference shares or stock of the company of the nominal value of £250 at the least. Any director may act before acquiring his qualification shares or stock," and (art. 91) that, "The office of director shall be vacated . . . . if he cease to hold his qualification shares, or do not acquire the same within three months after election or appointment." A holder of ten shares of £1 each accepted the office of director, and acted as such, but did not acquire his qualification shares within three months after election. It was held that he could not be settled on the list of contributories for more than ten shares. This decision rests, or at all events may be rested, on the terms of the articles of association, as is shewn most clearly by the judgment of Lord Justice *Bowen*. He says (2): "If the appellant is to be on the list it must be by virtue of an agreement within the meaning of sect. 23 to become a member, that is to say, an agreement to that effect with the company. Where is such an agreement to be found? The appellant signed the memorandum of association, and therefore, by virtue of sect. 16, he became bound to the same extent as if he had signed and sealed the articles, and they had contained a covenant by him to conform to all the regulations contained in them. But has he entered into any contract to take shares, because he has bound himself to conform to the regulations contained in the articles, including, of course, those as to the qualification of directors? There is no provision in the articles that the directors shall take the shares required for qualification, or

(1) 38 Ch. D. 42. (2) 38 Ch. D. 50.

C. A. 1892 ISAACS' CASE. Stirling, J.

be liable as if they had taken them. There is only a provision that if a director does not acquire the requisite number of shares within three months he shall cease to be a director. That regulation makes it his duty not to act after the three months; but that is quite different from a regulation that if he continues to act he shall be deemed to have contracted to take them. That seems to me to dispose of the case." Then he adds, "I do not say that the present case is governed by *Onslow's Case* (1), for that case is not sufficiently reported to be relied on."

The third case is that of *Ex parte Lord Inchiquin* (2). Lord *Inchiquin* was on the 22nd of October, 1888, appointed a director of a company whose articles provided that the qualification of a director should be the holding of at least forty shares in the company. At a board meeting held on the 25th of October, 1888, forty shares were allotted to him, and in respect of those shares his name was placed on the register; but he knew neither of the allotment nor of the registration. He acted as a director on the 28th of November, 1888, and on the 16th and 18th of January, 1889. He resigned on the 28th of January. It was held that he must be settled as a contributory for those shares. In that case there existed the elements of allotment and registration, which I am bound to treat as absent in the present case; but it is to be observed that Lord Justice *Bowen* (3) speaks of "the contract with the company by virtue of which he became a director and bound to qualify." That I understand to refer to an implied contract between the director and the company.

It does not appear to me that any one of these cases settles the question which was deliberately left open in *Hewitt's Case* and *Brett's Case* (4), and I am therefore compelled to express the opinion which I have myself formed. I think, then, that where a man has accepted the office of director, and acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration, and all the benefits which those

(1) 3 Times L. R. 42, 551.
(2) [1891] 3 Ch. 28.
(3) [1891] 3 Ch. 37.
(4) 25 Ch. D. 283.

articles provide for directors. To use the language of the present Master of the Rolls in *Swabey* v. *Port Darwin Gold Mining Company* (1), "the articles do not themselves form a contract, but from them you get the terms upon which the directors are serving." C. A. 1892 ISAACS' CASE. Stirling, J.

The articles in this case differ from those in any previous case, and are unusually plain and explicit. They provide that, "A first director may act before acquiring a qualification, but shall, in any case, acquire the same within one month from his appointment, and unless he shall do so"—and Sir *Henry Isaacs* did not —"he shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly."

It appears to me, therefore, that it was part of the implied contract between Sir *Henry Isaacs* and the company, that he would in the events which have happened take from the company, and that the company would allot to him, the qualification shares.

There were at all times, down to the winding-up of the company, sufficient shares to enable that allotment to be made to him.

In my opinion, it is established that he agreed with the company to take, and that the company agreed to allot to him, 100 shares. For that number he is consequently liable to be settled on the list of contributories.

This summons must accordingly be dismissed with costs.

From this decision Sir *Henry Isaacs* appealed. The appeal was heard on the 11th of April, 1892. C. A.

Buckley, Q.C., and *E. S. Ford*, for the Appellant, addressed to the Court the same arguments and cited the same authorities as they made use of in the Court below.

[KAY, L.J., referred to *Currie's Case* (2).]

Muir Mackenzie, for the Respondent, was not called upon.

LINDLEY, L.J.:—

I do not think there is any real difficulty in this case, and we are all of the same opinion. I do not know that I can improve

(1) 1 Megone, 385. (2) 3 D. J. & S. 367.

C. A. 1892 ISAACS' CASE. Lindley, L.J.

in any way upon the judgment of Mr. Justice *Stirling*, which seems to me to place the matter in the right light. The articles are peculiar, and at last we have got a form which will suffice to fix directors who act without qualification. The articles in this case are peculiarly worded. I never saw any like them before, though it has occurred to me that they might be so framed.

[His Lordship then read articles 71 and 72, and continued:—]

Those are the terms upon which Sir *Henry Isaacs* became a director, and those articles he signed. I do not think that the latter circumstance is essential, but it is not unimportant; it certainly carries this case further than the *Eley Case* (1), and the case of *Browne* v. *La Trinidad* (2). Regarding the articles simply as an offer to Sir *Henry Isaacs*, and other people, of terms on which they are to become directors, and this is perhaps the proper view of them, still Sir *Henry Isaacs* accepted those terms and he became a director. He became a director, to my mind, by signing the articles; under sect. 72 he assented to do so at once. But any possible doubt as to any inference to be drawn from the mere signing is removed by the fact that he actually acted as a director. There is no question as to his having accepted the terms.

Now, Mr. *Buckley* contends that no contract between Sir *Henry Isaacs* and the company is to be implied. Why not? He has assented to be treated as if he had agreed, and he has acted as if he had agreed, to take the shares from the company. And what is the position of the company? They are to be treated as having agreed forthwith to allot the shares to him accordingly. What more can be wanted? It appears to me, I confess, that the inference here is too plain to be mistaken, and that Sir *Henry Isaacs* is a contributory for the qualification shares to the amount of £1000. The appeal must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion. The draftsman of these articles has succeeded in getting out of the difficulties of previous cases, and out of the difficulty which has prevented this liability from attaching to the directors of a company in the case of a winding-up.

(1) 1 Ex. D. 20, 88. (2) 37 Ch. D. 1, 13, 14.

It is by the light of the decisions, and especially by the light of what fell from the Court in *In re Wheal Buller Consols* (1), that the point of law becomes intelligible and clear. Here is an article which provides that the qualification of a director is to be the holding of a certain number of shares in the company; and that a director, though he may act before he has a qualification, shall in any case acquire the same within one month from his appointment. Now, if it had stopped there, it may be, and probably would be, that a director, who had never taken shares, would not be held, upon the mere fact that he had been a director upon those terms, to have agreed to become a member of the company; and the reasoning upon which that conclusion would have been founded is as follows: "This article binds the members of the company only. It is not in itself a contract between the director and the company; and although it is true that by signing it the director bound himself to submit to it, it does not in terms go so far as to say that he is to be deemed to be a member of the company." He only agrees that his qualification ought to be such and such a number of shares, and it might have been added with impunity, as *In re Wheal Buller Consols* shews, that he was to vacate his appointment within a certain time if he did not acquire them.

But these articles go further. They say that unless he acquires these shares, he must be deemed to have taken these shares from the company. That goes further than *In re Wheal Buller Consols* and *Onslow's Case* (2) also. In the first place he is to be deemed to hold them, and in the next place he is to be deemed to hold them from the company.

What is the effect of the signature of the articles of association by this gentleman? At all events, as soon as he acts as a director of the company, and places himself in the position for which the articles provide, these articles shew the terms of the implied contract which thereupon arises between himself and the company. That is the effect of these articles—they amount to an offer put forward by the company to persons intending to become directors of the terms on which the directors are to act. It is perfectly true that the offer is contained in articles, which

(1) 38 Ch. D. 42. (2) 3 Times L. R. 42, 551.

C. A. 1892 ISAACS' CASE. Bowen, L.J.

are not drawn up as between the company and the directors, but nevertheless the company puts forward the terms of the articles as the terms by which it will be bound; and the director by becoming and acting as director of the company accepts that position.

That leads us on to examine the exact terms which he has accepted. He has gone much further than saying he shall be bound to accept the shares, much further than saying he shall vacate his office, for he says that if he does not take the shares he shall be deemed to have agreed to become a member. It seems to me whether you put it as a case of an agreement created by reason of his signature to the articles of association, or whether you put it—as I think I myself should put it—as an implied contract arising out of his position as a director of the company coupled with the articles which he has accepted, or whether you put it as a plea of estoppel, the inference is equally clear. In this case I am happy to say that justice is at last done as between creditors and directors by an article of this sort.

KAY, L.J.:—

I agree in the decision. The ground of my agreement is this, not that Sir *Henry Isaacs* is bound merely because he signed these articles, but that he is bound because, having these articles before him as the terms upon which he was to be a director of the company if he became a director, he deliberately accepted the position of director, and was not merely director but chairman—if that makes any difference—for much more than a month or a year. Now, what was the effect of this article? For a month, under this article, he had the opportunity of acquiring shares; but if within a month he did not acquire them, from the end of that month he is in this position—he shall be deemed to have agreed to take the shares from the company, and the company shall be bound to allot them to him. Under sect. 23 of the Act it is quite plain that when a man has agreed to take shares this Court will treat him as though he had the shares for the purpose of determining whether he is to be a contributory or not, in the case of the company being wound up. Therefore when a month had expired he was, by reason of his

having accepted the office of director and acted in that office for more than a month, in this position, which the terms of the articles laid before him as the position in which he was to be if he accepted and acted as director—namely, the position of a person who is to be "deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly."

After that it seems to me impossible that a person who, with this (call it what you like) offer, or statement of the terms upon which he was to hold the office, before his eyes, having deliberately accepted and acted in that office for more than a month, could possibly say to the company, "I am not to be deemed to have agreed to take the shares." I think it does amount to an agreement between him and the company, which was effected not only by the fact of his signing these articles, but by his accepting that office and retaining it for more than a month; and I must say I am not sorry to see that at last we have a form of articles which obliges gentlemen who take the position of directors, to accept also that obligation which other articles have in an imperfect way attempted to oblige them to accept, namely, to take a qualification of shares, or act as if they had taken them.

BOWEN, L.J.:—

I should like to add to my judgment one word. I am satisfied that our judgment is travelling exactly on the same lines as *In re Wheal Buller Consols* (1).

Solicitors: *D. P. Boote; Gush, Phillips, Walters, & Williams.*

(1) 33 Ch. D. 42.

W. W. K.

C. A.
1892
April 27.

ROGERS *v.* RICE.

[1891 R. 2018.]

Lessor and Lessee—Relief against Re-entry or Forfeiture—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

Held (affirming the decision of *Kekewich*, J.), that a lessee cannot apply under the *Conveyancing and Law of Property Act*, 1881, s. 14, for relief against re-entry or forfeiture after the lessor has actually re-entered.

North London Land Company v. *Jacques* (1) distinguished.

ON the 13th of February, 1891, *Rice*, as lessor, commenced an action to recover possession of a house from *Rogers*, the lessee, under a clause of re-entry if the premises were allowed to be out of repair to the value of £20 or upwards, and not repaired within three calendar months after notice.

A notice such as provided for by the *Conveyancing and Law of Property Act*, 1881, s. 14, sub-s. 1, requiring repairs to be done, was given more than three months before the commencement of the action. The Plaintiff also sought to recover arrears of rent and damages for want of repair.

The action was tried before Mr. Justice *Denman* on the 18th of July, 1891. The Defendant did not appear. Judgment was given for possession, for £5 2*s.* 4*d.* rent, for £50 damages, and for costs. A writ of possession was issued on the 25th of July, 1891, and possession was given to the Plaintiff by the sheriff on the 28th of July.

On the 31st of July the Defendant by special leave gave notice of motion to extend the time for moving to set aside the verdict and judgment. The motion was heard by Mr. Justice *Denman* and refused.

On the 7th of August *Rogers* took out and served on the 10th an originating summons, under sect. 14, sub-sect. 2, for relief against re-entry and forfeiture. The damages and costs had not yet been paid, but executions for them had been issued.

On the 20th of November an order was made in *Rice* v. *Rogers* directing the proceeds of the executions to be brought into

(1) 32 W. R. 283.

Court, and staying all proceedings to enforce the judgment pending the originating summons.

On the 5th of February, 1892, Mr. Justice *Kekewich* dismissed the summons on the ground that no relief could be given after the landlord had recovered possession.

Rogers appealed.

Renshaw, Q.C., and *Bramwell Davis*, for the appeal:—

Quilter v. *Mapleson* (1) is relied on against us, and if the remarks there made had been the ground of the decision of the Court we should have had no case; but they were extrajudicial, the point in question being whether relief could be given under the Act in respect of breaches committed before the Act, and in proceedings pending when the Act came into operation. The *Conveyancing Act*, 1881, s. 14, sub-s. 2, enables the Court to give relief "where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture." The only way in which the right can be enforced otherwise than by action is when the possession is vacant, so that the lessor can walk in; and a lessor who so walks in is proceeding to enforce his right, and is still proceeding though he has actually entered. This shews that "proceeding" must be taken in a wide sense. Moreover, the action in the present case is still pending, for the judgment has not been finally worked out, and the Plaintiff is still proceeding. In *North London Land Company* v. *Jacques* (2), relief was given after the landlord had recovered possession.

Warmington, Q.C., and *W. B. Allen*, for the landlord, were not called upon.

LORD COLERIDGE, C.J.:—

I think it quite clear that the *Conveyancing and Law of Property Act*, 1881, s. 14, sub-s. 2, does not apply. The words are, "Where a lessor is proceeding . . . . to enforce such a right of re-entry or forfeiture." Here proper notice was given, under sect. 14, sub-sect. 1, before the lessor commenced his action. The lessee did nothing to comply with the notice. The action

(1) 9 Q. B. D. 672. (2) 32 W. R. 283.

C. A. 1892 ROGERS v. RICE. Lord Coleridge, C.J.

proceeded to judgment, the judgment was executed, so far as possession was concerned, and at the time when the present proceeding was commenced the lessor was in possession. The action then, so far as related to enforcing the right of re-entry, was at an end, and it cannot be said that the landlord was "proceeding" to enforce his right of re-entry. The case is clear on the terms of the Act, but I cannot omit to notice that the same view was taken by the Judges of the Court of Appeal in *Quilter* v. *Mapleson* (1), where all three judges gave their opinion to this effect, though that was not the point on which their decision turned. The Lord Justice *Bowen* puts it in words which I adopt as my own, "Under sect. 14, sub-s. 2, of the Act of 1881, the tenant may apply for relief until the landlord has re-entered." The three judges had their attention directed to this clause of the Act, and put the same construction upon it.

LINDLEY, L.J.:—

I also am of opinion that this application was too late. The case before *Bacon*, V.-C., is distinguishable, for there the lessor had not given a notice complying with the requisitions of sect. 14, sub-sect. 1.

KAY, L.J.:—

I agree, and have nothing to add.

Solicitors: *Francis Miller & Co.; Collins & Collins.*

(1) 9 Q. B. D. 672, 677.

H. C. J.

EVANS *v.* EVANS.

C. A.
1892
KEKEWICH, J.
Jan. 21.
C. A.
March 30, 31; *April* 11.

[1891 E. 1342.]

Deed—Construction—Rule in Shelley's Case.

By a deed of conveyance lands were limited to the use of *E.* and his assigns during his life without impeachment of waste, with an ultimate limitation to the use "of such person or persons as at the decease of the said *E.* shall be his heir or heirs at law, and of the heirs and assigns of such person or persons."

Held (reversing the decision of *Kekewich*, J.), that the rule in *Shelley's Case* (1) did not apply, and that *E.* took, not an estate in fee simple, but merely a life estate, with a contingent remainder in fee to the person or persons who at his death answered the description of his heir or co-heirs at law.

BY an indenture, dated the 9th of March, 1854, reciting that *John Evans, Thomas Evans,* and *Owen Evans* had agreed to purchase the hereditaments thereinafter expressed to be thereby granted and the inheritance thereof in fee simple free from incumbrances for the sum of £620, and were desirous that the same should be settled and assured to the uses upon the trusts and in manner thereinafter appearing, certain hereditaments in the county of *Cardigan* were in consideration of the sum of £620 paid by *John Evans, Thomas Evans,* and *Owen Evans,* conveyed to *John Evans, Thomas Evans,* and *Owen Evans,* and their heirs, to hold the same unto the said *John Evans, Thomas Evans,* and *Owen Evans,* their heirs and assigns, to such uses upon such trusts and in such manner in all respects as the said *John Evans, Thomas Evans,* and *Owen Evans* should, by any deed or deeds, jointly appoint, and in default of and until such joint appointment and so far as no such appointment should extend then to certain other uses separately declared in respect of three equal third parts or shares, the uses as respected the third part or share of *Owen Evans* being in the words following:—

"To such uses upon such trusts and for such estates or estate in favour of the said *John Evans,* and *Thomas Evans,* or either of them as the said *Owen Evans* shall by any deed or deeds with or

(1) 1 Rep. 93 b.

C. A. 1892 EVANS v. EVANS.

without power of revocation and new appointment from time to time appoint, and in default of and until such appointment and so far as no such appointment shall extend, to the use of the said *Owen Evans* and his assigns during his life without impeachment of waste, and after his decease, to the use of the said *John Evans* and *Thomas Evans* and their assigns as tenants in common for their joint lives without impeachment of waste, and after the death of either of them, to the use of the survivor of them the said *John Evans* and *Thomas Evans* and his assigns during his life without impeachment of waste, and after the death of such survivor, to such uses upon such trusts and in such manner in all respects as the said *Owen Evans* shall by will or codicil appoint, and in default of such appointment, and as far as no such appointment shall extend, to the use of such person or persons as at the decease of the said *Owen Evans* shall be his heir or heirs at law, and of the heirs and assigns of such person or persons."

Corresponding uses *mutatis mutandis* were declared by the deed in respect of the two-third parts or shares of *John Evans* and *Thomas Evans*.

The powers of appointment contained in the deed, preceding the life estate of *Owen Evans*, were never exercised so far as his third part or share was concerned.

Owen Evans survived *John Evans* and *Thomas Evans*, and by an indenture dated the 21st of June, 1878, conveyed all his third share in the hereditaments comprised in the deed of 1854, unto and to the use of the Plaintiff, his heirs and assigns, but subject to a rentcharge payable to *Owen Evans* during his life. This conveyance contained covenants for title on the part of *Owen Evans*.

Owen Evans died on the 10th of October, 1888, having made a will, dated the 20th of March, 1882, whereby he specifically devised one half of his share and interest in the hereditaments to *Benjamin Evans* (who, however, predeceased him) and the other half to the Defendant *Thomas Parry*, and leaving the Defendant *Evan Evans*, his heir-at-law.

The third part or share of *Thomas Evans* had become vested in the Plaintiff and that of *John* in the Defendant *Evan Evans*.

The Plaintiff, by this action, claimed a declaration that he was absolutely entitled to two undivided third parts of the hereditaments, and the Defendant *Evan Evans* to the remaining third part; or, in the alternative, a declaration that the third part which was made subject to the general power of appointment by *Owen Evans* by will, was liable to the payment of damages to the Plaintiff under the covenants for title in the conveyance of June, 1878.

The point of law was now argued, whether upon the true construction of the deed of March, 1854, a life estate only, or an estate in fee simple, passed to *Owen Evans* in his third share.

The action was heard before Mr. Justice *Kekewich* on the 21st of January, 1892.

Warmington, Q.C., and *H. M. Williams*, for the Plaintiff:—

The rule in *Shelley's Case* (1) is applicable, and the word "heirs" in the ultimate limitation of the share of *Owen Evans* is to be read as a word of limitation and not of purchase. In applying that rule it is immaterial that there are superadded to the word "heirs" words of description which do not differ in effect from that which the law implies. Here the words "such person or persons as at the decease of the said *Owen Evans* shall be his heir or heirs at law," are nothing more than a periphrastic expression equivalent to the word "heirs," which is itself a term of legal art to describe the person or persons who at the death of a man intestate will take his real estate.

Moreover, words of limitation superadded to the word "heir," being a general heir, do not affect the application of the rule, and in order to make the word "heirs" a word of purchase there must be shewn a clear intention that the property should devolve in a special line of descent: *Holloway* v. *Holloway* (2); *Richards* v. *Lady Bergavenny* (3).

[KEKEWICH, J., referred to *De Beauvoir* v. *De Beauvoir* (4).]

There is no authority directly in point, but *Fuller* v. *Chamier* (5) is the nearest case.

(1) 1 Rep. 93 b.
(2) 5 Ves. 399.
(3) 2 Vern. 324.
(4) 3 H. L. C. 524, 557.
(5) Law Rep. 2 Eq. 682.

C. A. 1892 EVANS v. EVANS.

The present case is clearly not within the exception in *Archer's Case* (1), because there the superadded words were such as to alter the course of descent. *Shelley's Case* (2) alone, without any other authority, is sufficient to decide this case.

Renshaw, Q.C., and *L. H. Jenkins*, for the Defendants :—

The rule in *Shelley's Case* does not apply, but the ultimate limitation is to a new *stirps*, and the word "heirs" is a word of purchase. We agree that the superadded words are not of themselves sufficient to prevent the application of the rule, but their presence is an ingredient to be considered in ascertaining the intention of the parties. The Court has first to discover what the limitation means, and if it is found to be a limitation to the heir then the rule applies, however contrary it may be to the intention otherwise apparent; but if it is found that the parties intended to indicate an individual person the rule does not apply; *Fearne* on Contingent Remainders (3); Co. Inst. (4); 1 *Harg.* Law Tracts (5). Here there is a periphrastic expression pointing to individuals in technical and proper words carefully inserted and followed by words of limitation. That is an indication the Court can look at before it decides whether it was the intention to create a new line of succession: Co. Inst. (6). The test is whether the word "heirs" is used to embrace all the descendants of the ancestor collectively, successively, and indefinitely, in which case it is a word of limitation; or whether it only applies to persons to be selected in a particular way pointed out by the testator: *Watkins* on Descents (7); *Preston* on Estates (8); *Hayes* on Conveyancing (9); *Hodgeson* v. *Bussey* (10); *Bagshaw* v. *Spencer* (11); *Goodtitle* v. *Herring* (12); *East* v. *Twyford* (13); *Jordan* v. *Adams* (14). Here there are words which import selection, and the words without "impeachment of waste" indicate that *Owen Evans* was only intended to take a life estate. Neither

(1) 1 Rep. 66 b.
(2) Ibid. 93 b.
(3) 10th Ed. vol. i. pp. 186 *et seq.*
(4) 376 b.
(5) Pages 507, 562, 574, 575, 577.
(6) 377 a.
(7) 4th Ed. p. 203.
(8) Vol. i. p. 273.
(9) 5th Ed. vol. i. pp. 542 *et seq.*
(10) 2 Atk. 89.
(11) Ibid. 577.
(12) 1 East, 264, 276.
(13) 4 H. L. C. 517.
(14) 29 L. J. (C. P.) 180.

in *Richards* v. *Lady Bergavenny* (1), nor in *Fuller* v. *Chamier* (2) were there any superadded words of limitation.

Warmington, in reply, referred to *Fearne* on Contingent Remainders (3).

KEKEWICH, J.:—

It is somewhat strange that this point is not directly covered by authority. I mean that there is not forthcoming some case, or, at any rate, some dictum in a text-book of authority going directly to the point, because although the ultimate remainder here is not in a common form, it is certainly not in a form unknown to the profession. A limitation of this sort is often met with in wills, and I should say also sometimes in deeds, but no decision has been cited which can be said to govern the present case directly. The nearest is that of *Fuller* v. *Chamier*. There the limitation was "after their decease"—there being three preceding legal estates for life—"I give and bequeath the said freehold estate unto the next lawful heir of *A*"—one of the tenants for life—"for ever." There are two manifest distinctions between that case and this in the words used, and when the Court is dealing with a question of intention the words are all-important. The "next lawful heir" is a phrase much more like "the heir" than the words I have here, "such person or persons as at his decease shall be his heir or heirs-at-law." "Next heir" is really equivalent to "the heir," and the word "next" being frequently added in common parlance, is not intended to express more than the person who will next succeed, but who possibly—such are the accidents of life—may not actually succeed. "Lawful," of course, does nothing at all, so that there is less indication there of a particular person; and the words "for ever" are different from the words I have here, "and of the heirs and assigns of such person or persons." The words "for ever" are used there in a will, and no doubt would be taken to be equivalent to words of limitation in fee. The Vice-Chancellor Sir *W. Page Wood* thought that the rule in *Shelley's Case* (4)

(1) 2 Vern. 324.
(2) Law Rep. 2 Eq. 682.
(3) 10th Ed. vol. i. p. 189.
(4) 1 Rep. 93 b.

C. A. 1892 EVANS v. EVANS. Kekewich, J.

applied, and in the last few words in his judgment (1) he thus summed up his reasons: "It is clearly, in my opinion, an estate executed in the ancestor, and these superadded words simply amount to an indication that the next heir male shall take in perpetual succession;" he might have left out the word "next" without at all interfering with the force of his observation, except that it shews that he had the exact words in his mind at the time. That is really the question which I have to decide, whether the superadded words which I have here do or do not amount to an indication that the heir shall take in perpetual succession. The words there were "for ever," here they are the words which I have mentioned. These are the only points of difference between the two cases. The question is one of intention, but the rule is one of general intention only. Of late years, for very sound reasons, the Court has said very little about general intent; none of the recent cases say much about the distinction which was formerly drawn between general intent and particular intent, and that distinction, as we know, led to some little confusion and to some erroneous decisions. But one has to bear it in mind frequently in construing documents. I think it may fairly be said that in every case in which the rule arises there is an intention to give the ancestor who is the first taker an estate for life only. I do not suppose, looking at the matter in a general point of view, that any testator or donor ever intends to give anything but a life estate to the first taker, even where there are intermediate limitations between the gift to the first taker and the gift to his heirs, and certainly he cannot intend to do that where there are no intermediate limitations, and yet the same result follows. Therefore such arguments as that which has been founded on the use of the words "without impeachment of waste" really go for nothing. I take it for granted that if the draughtsman were asked whether it was his intention to give the first taker a life estate he would say "By all means." Whether he would answer in the same manner, if asked whether he intended to exclude the rule in *Shelley's Case* (2), is another question. Now, I think I have power to look at all the circumstances under which the deed was executed, not going beyond

(1) Law Rep. 2 Eq. 687. (2) 1 Rep. 93 b.

the deed except so far as the Court is always entitled to see who the parties are and what the circumstances. I find that these three persons, *John*, *Thomas*, and *Owen Evans*, purchased the property and carefully divided it into thirds, and each settled it on himself in the particular manner indicated, and there is no appearance of an intention to settle on anybody else. As regards each of the three shares each of the parties has some rights, the estate for life, a power of appointment, and the possibility of having an appointment made in his favour, and in each case in succession the grantee for life has a general power of appointment before the ultimate limitation. There is no indication, so far as I can see, of a settlement on persons outside these three. The intention which I am asked to attribute to them is to make a settlement on some person outside the three. If the contention of the Defendants prevails it must be because the intention of the grantor—*Owen Evans* so far as this question is concerned—is not that his heirs but the heirs of the person who happened to be his heir at the date of his decease should take. Of course that might be very material. The persons to take by the ordinary rules of descent from the heir of *Owen Evans* and his heirs, might be entirely different from those taking by the ordinary rules of descent through *Owen Evans* himself. A different rule is in fact applied in each case because you go back to a different *stirps*. In favour of the Defendant's contention there is, no doubt, this circumstance, which occurred to me at an early period in the case, and which was really Mr. *Renshaw's* main point, that the draughtsman obviously knew what legal language was and how to phrase his sentences. He might easily have said "to the use of *Owen Evans* and his heirs for ever." That would have occupied not much more than a line of print, whereas he has taken three lines to express what, according to the Plaintiff's view, is the same thing. He might have done it, and I think I ought seriously to consider whether he did not intend something different when he departed from the simpler form of words; and I am bound to observe that he does it three times over. But, after all, what has he done? He has limited an estate to the heir of *Owen Evans*. The expression "such person or persons as at the decease of the said *Owen Evans* shall be his heir or heirs-

C. A. 1892 EVANS v. EVANS. Kekewich, J.

at-law" is only a circumlocutory expression for *Owen Evans*' heir. It really means nothing more nor less, and I think I should be giving too much effect to such a limitation if I were to construe it to mean anything more. That does not quite get rid of the difficulty, because he has gone on to say "and of the heirs and assigns of such person or persons." Again I see that the draughtsman knew how to use legal language. The language is fairly concise, I should say very concise according to the date of this deed. Yet he might have said simply "and his heirs or assigns." Does that make any difference? Mr. *Renshaw* referred me to a passage in *Fearne* on Contingent Remainders (1), quoting from *Hargrave*, as shewing that the question to be considered is whether it was the intention of the deed to make a new starting-point, and to say in effect that the estate was to go to the heir, who was to take it "in fee simple" or "for ever"—though of course those particular words could not be used in this deed. Was it the intention of the deed to make a new "terminus" as *Hargrave* calls it, or *stirps* as I ventured to term it—a new starting point in the pedigree or history of the estate? If I thought it was, the construction would follow from that, and the rule in *Shelley's Case* (2) would be excluded. But I think that would be straining the language too far, and that if the draughtsman intended that he has failed to express what he intended, and that "heirs and assigns of such person or persons" is a circumlocutory manner of saying "his or their heirs and assigns." I think he has to all intents and purposes only said to *Owen Evans*, his heirs and assigns. The intention in effect was to give the estate to *Owen Evans* in fee through the medium of a general power followed by a limitation to his heir. Therefore, I think the Plaintiff must succeed.

C. C. M. D.

C. A. The Defendants appealed. The appeal came on for hearing on the 30th of March, 1892.

Renshaw, Q.C., and *L. H. Jenkins*, for the Appellants:—

Under the limitations of the deed, *Owen Evans* took an estate for life with a contingent remainder in fee to the person or

(1) 10th Ed. vol. i. pp. 186 *et seq.* (2) 1 Rep. 93 b.

persons who answered the description of his heir or heirs at his death. The sole question is whether the premises, on which only the rule in *Shelley's Case* (1) can fairly operate, really exist; namely, whether by the expression "such person or persons as at the decease of the said *Owen Evans* should be his heir or heirs-at-law," was meant all the heirs *in infinitum* of the tenant for life, or only such person or persons as should at the single moment of his death answer that description. The decision of the Court below proceeded upon *Fuller* v. *Chamier* (2), but that case cannot be treated as an authority in favour of the applicability of the rule: it has no similarity in its circumstances; there were no superadded words of limitation; and, finally, Vice-Chancellor *Wood* found there, as matter of construction, that the testator's intention was that the next heir male should take in perpetual succession. It must be conceded by the Respondent that if the limitation had been to "such person or persons as shall be the heir," and the word "heirs" was not present, this case would be within *Archer's Case* (3), and the use of the word "heirs" in the plural was designed to meet the possibility of there being coparceners, or persons claiming through coparceners, living at the death of *Owen Evans*, and not for the purpose of including the whole line of heirs. The case, therefore, really comes within *Chambers* v. *Taylor* (4), and *Willis* v. *Hiscox* (5). There is no authority which exactly covers the present case, and the nearest case is *Greaves* v. *Simpson* (6), in which the limitation was on trust for *G.* for life, and after the decease of *G.* on trust for the heir or heiress-at-law of the said *G.*, his or her heirs and assigns for ever. It was held that *G.* took only a life estate, with a limitation by purchase to the individual who at his death would answer the description of his heir or heiress-at-law in fee simple. The words used in this case seem to have been taken from Mr. *Butler's* note on *Coke* upon *Littleton* (7), where words almost identical with those we have here are used as apt to designate as a purchaser the particular person answering the description of heir at the death of the tenant for life, and the view put forward there

(1) 1 Rep. 93 b.
(2) Law Rep. 2 Eq. 682.
(3) 1 Rep. 66 b.
(4) 2 My. & Cr. 376.
(5) 4 My. & Cr. 197.
(6) 10 Jur. (N.S.) 609.
(7) 376 b. *et seq.*

C. A. 1892 EVANS v. EVANS.

is one shared and propounded by other eminent conveyancers: see *Fearne* on Contingent Remainders (1), *Hayes* on Conveyancing (2). It will be contended that *Richards* v. *Lady Bergavenny* (3) governs this case; but there no words of limitation were superadded such as we have here. Very little light is really thrown upon the case by reading other wills and deeds, and attempting to find in each one of the several elements we have here, and to draw a conclusion therefrom. This deed must be read by itself, and it first must be determined, as matter of construction, without reference to the rule in *Shelley's Case* (4), whether by the particular expression used it was intended to embrace all the heirs of *Owen Evans* successively and indefinitely, or whether the expression was only intended to extend to particular selected persons out of the whole class; that is to say, to those selected persons who shall answer the description at the death of *Owen Evans*. It is only when this question of construction has been decided, that it becomes necessary to consider the rule in *Shelley's Case*, which is no index to the testator's intention, and that rule will only apply if, as matter of construction, it is determined that the intention was to embrace the whole line of heirs. In this case it is clear the expression was intended to extend only to the selected persons answering the description of heir at *Owen Evans*' death, and for these reasons: there is the recital of an intention to settle; *Owen Evans*' estate is expressly stated to be for life and without impeachment of waste; and the final limitation is not to the heirs *simpliciter*, but to such person or persons as at the decease of the said *Owen Evans* should be his heir or heirs-at-law, and the heirs and assigns of such person or persons. *Chamberlayne* v. *Chamberlayne* (5) is in our favour and is a strong case, as there was there no express limitation of a life estate.

[*Hodgeson* v. *Bussey* (6), and *Watkins* on Descents (7), were also referred to.]

Warmington, Q.C., and *H. M. Williams*, for the Plaintiff:—

Jesson v. *Wright* (8) shews that the rule in *Shelley's Case* is

(1) 10th Ed. vol. i. p. 187.
(2) 5th Ed. vol. i. pp. 542, 549.
(3) 2 Vern. 324.
(4) 1 Rep. 93 b.
(5) 6 E. & B. 625.
(6) 2 Atk. 89.
(7) 4th Ed. p. 170.
(8) 2 Bli. 1, 50.

unsparingly applied in favour of the general intent, in defiance of the particular intention expressed; and there is no instance of the application of the rule being excluded unless the word "heir" is used in the singular and words of limitation are superadded. "Heir or heirs" is equivalent to "heirs": *Bony* v. *Taylor* (1); so the use of the word "heir" here cannot be relied on. The words "at his death" are equally insufficient to exclude the rule: *Richards* v. *Lady Bergavenny* (2). The use of superadded words of limitation is insufficient: *Mills* v. *Seward* (3). As regards *Watkins* on Descents, see the note by *Joshua Williams* in the 4th edition (4); *Butler's* note in *Coke* upon *Littleton* (5). Three of the expressions relied on are therefore covered by authority, and nothing is left but "such person or persons as," &c., and those words cannot in principle make any difference. There is no logical distinction between "the heir" and "the person who shall be heir," for the heir must be a person.

Renshaw, in reply:—

First, consider what the rule in *Shelley's Case* (6) is—it is stated in *Jarman* on Wills (7). There must be a limitation to heirs or heirs of the body. Is there here a limitation to the heirs of *Owen Evans*? Clearly not in express terms; the deed is framed with the plain intention of making a gift to persons who at a particular time answer a particular description. They were not to take in the capacity of heirs.

[BOWEN, L.J., referred to *Jones* v. *Morgan* (8).]

Jesson v. *Wright* (9) only decided that words of distribution will not exclude the rule. *Mills* v. *Seward* went a step further, and decided that words of distribution with words of limitation superadded will not exclude it; but there is no case in which it has been applied where there was such an expression of intention to give *in personæ designatæ* as the present.

(1) 2 Roll. Abr. 253, pl. 3.
(2) 2 Vern. 324.
(3) 1 J. & H. 733.
(4) Page 170.
(5) 377 b, par. 6.
(6) 1 Rep. 93 b.
(7) 4th Ed. vol. ii. p. 332.
(8) 1 Bro. C. C. 205.
(9) 2 Bli. 1.

C. A. 1892 EVANS v. EVANS.

April 11. LINDLEY, L.J.:—

The question raised by this appeal is whether *Owen Evans* took an estate in fee or for life only in certain property settled by a deed dated the 9th of March, 1854, and which was as follows:—[His Lordship read the material part of the deed.]

The question which arises on these limitations may be put in various ways: *e.g.*, Does the rule in *Shelley's Case* (1) apply to this deed? or, Does the modification of that rule known as the rule in *Archer's Case* (2) apply to it? or, Do the person or persons who are to take on *Owen Evans'* death take by descent or purchase? or, Do they take as his heirs, or as *personæ designatæ* who are to form a new stock from which the succession in future is to be traced?

Before reference is made to the rule in *Shelley's Case* or *Archer's Case*, or to any rule of law, the first thing is to ascertain the meaning of the words used. What, then, is the meaning of the words "such person or persons as at the decease of *Owen Evans* shall be his heir or heirs at law"? To an ordinary layman these words would mean neither more nor less than his heir or heirs at his decease. The words certainly do not mean the heir or heirs of any one else. But a lawyer cannot help seeing that this circumlocution was had recourse to in order to avoid the effect of employing the use of the simpler and more technical words "heir" or "heirs." The object of using the expression in the deed is to a lawyer unmistakeable, and is to designate persons who are not to take by succession from *Owen Evans*, but who are to take by purchase, *i.e.*, who are to be a new *stirps* or starting-point from whom the succession is to be traced. This is made still plainer—plain to demonstration—by the words "the heirs or assigns of such person or persons," not the heirs or assigns of *Owen Evans*, but possibly a larger class, including the heirs *ex parte maternâ* of the first takers, who would not take by descent if *Owen Evans* were the *stirps*. To a lawyer, therefore, the expression used in this deed is not equivalent to "the heirs or assigns of *Owen Evans*," but is intended to have—and has—a different meaning. It is to be observed that the limitation being in a deed executed in 1854, if the words "heirs and assigns"

(1) 1 Rep. 93 b. (2) 1 Rep. 66 b.

had not been added, the person or persons who would have taken the property would have taken as purchasers, but for life only, or they would have taken for life only, and therefore as purchasers. This was decided in *Chambers* v. *Taylor* (1), and this decision goes far to shew that the expression "person or persons who shall be his heir or heirs" is not equivalent to "his heir or heirs," and is not used to denote a class of persons who can be correctly described as his heirs generally.

A man cannot at his decease have more than one heir, for although several females may be co-heiresses, yet they are in point of law only one heir.

The expression used in this deed would have been more accurate if it had run thus: "To the use of such person or persons as at the decease of the said *Owen Evans* shall be his heir-at-law, and of the heirs or assigns of such person or persons." Had this more accurate form been used, *i.e.*, had the word "heir" been used in the singular, it would clearly have been covered by *Archer's Case* (2), and not by *Shelley's Case* (3).

The conclusion is, therefore, I think, irresistible, that the property in question is not intended to be and is not limited to *Owen Evans* for life with an ultimate remainder to his heirs, in the sense of all his heirs, and to them only. But this is essential for the application of the rule in *Shelley's Case*.

The power of appointment does not exclude the application of the rule in *Shelley's Case*: see, *inter alia*, *Richardson* v. *Harrison* (4). The expression "such heir as should be living at the death" occurred in *Richards* v. *Lady Bergavenny* (5), and "heir for ever" in *Fuller* v. *Chamier* (6), which was the case of a will. The words "heir or heirs, and the heirs of such heir or heirs," occurred in *Bony* v. *Taylor* (7); but the other words are different, and the difference is very material. The expression "heirs of the body, and his, her, and their heirs and assigns as tenants in common," occurred in *Mills* v. *Seward* (8). In all of these the rule in *Shelley's Case* was held to apply, and they come very near the present case.

(1) 2 My. & Cr. 376.
(2) 1 Rep. 66 b.
(3) Ibid. 93 b.
(4) 16 Q. B. D. 85.
(5) 2 Vern. 324.
(6) Law Rep. 2 Eq. 682.
(7) 2 Roll. Abr. 253, pl. 3.
(8) 1 J. & H. 733.

C. A. 1892 EVANS v. EVANS. Lindley, L.J.

On the other hand, there are cases, also very like them and like this, where the rule in *Shelley's Case* (1) has been held not to apply; but in all of those the limitation was to heir in the singular; and this case is not quite covered by any other decision which I have been able to discover, aided by counsel on both sides. In *Archer's Case* (2) the limitation was to the next heir male and the heirs male of his body. In *Greaves* v. *Simpson* (3) real and personal property were given in trust for *A.* for life, and after his death in trust for his heir or heiress, his or her heirs and assigns for ever. Similar observations apply to *Willis* v. *Hiscox* (4) and to *Chamberlayne* v. *Chamberlayne* (5), which were referred to in the argument. These come as near the present case as any in the other class.

Nothing, however, is gained by comparing case with case, except for the purpose of ascertaining the principles which ought to be applied to any particular case, and the technical meaning, if any, of particular words or phrases. The rule in *Shelley's Case* is a rule of law applicable to deeds or wills by which real property is given to *A.* for life, with remainder sooner or later to his heirs in fee or in tail, and I take the rule to be that if in any instrument the word "heir," or the word "heirs," or the two words combined, are used in the sense of all the heirs of a person who under the same instrument takes a life estate in real property, and no other heirs, the property given to the heir or heirs of the first taker is in point of law given to him, although it is in terms given to him for life only. In the case supposed, the rule requires the heir or heirs to take by descent from him, and not by purchase, as they might if the property were limited to them by name, or otherwise than simply as his heir or heirs. The rule in *Shelley's Case* has been said to give effect to the general, as distinguished from the particular, intention of settlors and testators: see *per* Earl *Cairns* in *Bowen* v. *Lewis* (6); but the rule has the demerit of sacrificing in almost every case an intention which is clear and unmistakeable, to an intention which is by no means clear, and which is rather attributed to than

(1) 1 Rep. 93 b.
(2) Ibid. 66 b.
(3) 10 Jur. (N.S.) 609; 12 W. R. 773.
(4) 4 My. & Cr. 197.
(5) 6 E. & B. 625.
(6) 9 App. Cas 890, 907.

expressed by the settlor or testator: see *per* Lord *Bramwell* (1). But unsatisfactory as the rule is if attempted to be defended upon the ground that it gives effect to a settlor's or testator's intentions, it must not be forgotten that the rule produces a very beneficial practical effect by rendering property more marketable than it otherwise would be. The rule may be justified and approved on this ground, as was pointed out by Lord Justice *Fry*, in *In re Parry and Daggs* (2). Had it not been for the good practical results of the rule, the Courts would probably have struggled to escape from it rather than have consistently upheld it whenever it has been technically correct to do so. No one can study the mass of decisions on this subject without being struck with the extent to which the rule in *Shelley's Case* (3) has been carried, and with the comparatively few cases to which the doctrine laid down in *Archer's Case* (4) has been held applicable. This is the more remarkable as the rule in *Archer's Case* gives effect to, whilst the rule in *Shelley's Case* almost always defeats, the particular intention of the settlor or testator. However, I have found no case in which the doctrine in *Archer's Case* has been applied to a limitation to heirs in the plural; but in this case, although the expression "heir or heirs" occurs, that expression is used in the sense of heir in the singular, as I have already pointed out.

The conclusion at which I have arrived is in accordance with the passages cited from Mr. *Butler's* note in *Coke* upon *Littleton* (5), from Mr. *Fearne's* celebrated book (6), and from *Hayes'* Conveyancing (7). It is quite clear that these great conveyancers (and Mr. *Hargrave*, who is quoted by *Butler*) were of opinion that a limitation in the form adopted in this deed would suffice to give *Owen Evans'* heir or heirs an estate in fee by purchase, and this deed has, I have no doubt, been framed as it is on the faith of the correctness of their opinion. I am glad to think that in upholding it I am not running counter to, but am, on the contrary, deciding in conformity with, the opinion of such eminent men.

The appeal, therefore, must be allowed, and it must be declared

(1) 9 App. Cas. 921.
(2) 31 Ch. D. 130, 134.
(3) 1 Rep. 93 b.
(4) 1 Rep. 66 b.
(5) 377 a.
(6) 10th Ed. vol. i. pp. 188, 189.
(7) 5th Ed. vol. i. p. 543.

C. A. 1892 EVANS v. EVANS.

that *Owen Evans* took for life only the property in dispute, and the Plaintiff must pay the costs of the appeal and of the action.

BOWEN, L.J.:—

Having discussed this case with my learned Brothers out of Court, and having read the judgment of the Lord Justice *Lindley*, I have little more to say than that I entirely concur in it. The rule in *Shelley's Case* (1) is no guide to the construction of an instrument; we have to ascertain the construction, and then see whether the rule applies. It is contended by the Respondents that the three cases of *Richards* v. *Lady Bergavenny* (2); *Bony* v. *Taylor* (3), and *Mills* v. *Seward* (4), nearly cover the whole ground. But it is not a right principle of construction to say that one authority covers one point in the case before us, and that another authority covers another point, and therefore a certain conclusion is to be come to. We must look at the document as a whole, and for the reasons given by Lord Justice *Lindley* I am of opinion that, according to the true construction of this instrument, the rule in *Shelley's Case* is not applicable. This decision appears to be in conformity with the opinion of several great conveyancers of past time.

KAY, L.J.:—

The rule in *Shelley's Case*, which is said to be much older than that case, is a rule of law, not a rule of construction. Various reasons have been suggested as the origin of it. One perhaps of the most plausible is that given by Mr. Justice *Blackstone* in *Perrin* v. *Blake* (5), that it was established to prevent the inheritance being in abeyance, and from the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by vesting the inheritance in the ancestor: *Fearne* on Contingent Remainders (6). Whatever its origin, a study of the cases held to come within it justifies the observation with which the valuable note on *Shelley's Case* in

(1) 1 Rep. 93 b.
(2) 2 Vern. 324.
(3) 2 Roll. Abr. 253, pl. 3.
(4) 1 J. & H. 733.
(5) 4 Burr. 2579.
(6) 10th Ed. vol. i. p. 85.

Tudor's Leading Cases on Real Property begins (1), that there is no rule which has been adhered to more inflexibly. Certainly at this day the Courts would not be disposed to depart from the old cases in order to facilitate the tying up of land by what seems a very useless form of contingent remainder.

But the construction of any document must be independent of the rule. It is not illegal to limit a contingent remainder to take effect after any number of successive life estates to persons in being, nor to make the contingency a contingency of the person to take—as, for instance, to *A.*, *B.*, and *C.*, successively for life, and at the death of the survivor to the right heirs of *D.* No life estate being given to *D.* the limitation to his heirs must take effect as a contingent remainder, if at all. So if it had been to the nearest male relation of the survivor of the tenants for life who should be in existence at his death. And numerous other instances might be given. Where the gift is to the heir or heirs of some one who takes a life estate under the same instrument, the construction that by such words a person is designated who is to take by purchase, is one against which the Courts have very strongly leaned. Nevertheless there are established exceptions.

The rule in *Shelley's Case* (2) only applies in terms where the word used is "heirs" in the plural.

The addition of the ordinary words of inheritance "and their heirs" makes no difference, even though appended to the words "heirs of the body."

But if the word "heir" in the singular be used in a devise, as "to *A.* for life with remainder to his heir," the rule still applies: *King* v. *Melling* (3). However, where "heir" in the singular is used, the case is more easily taken out of the rule. The addition of words of limitation, as "and the heirs or heirs of the body of that heir" are held then to be sufficient to shew that the heir is *persona designata: Archer's Case* (4); *King* v. *Melling*; *Greaves* v. *Simpson* (5).

We have in this case to deal with a limitation by deed, not

(1) 3rd Ed. p. 599.
(2) 1 Rep. 93 b.
(3) 1 Vent. 214.
(4) 1 Rep. 66 b.
(5) 10 Jur. (N.S.) 609; 12 W. R. 773.

C. A. 1892 EVANS v. EVANS Kay, L.J.

will. It is in effect (subject to an overriding power of appointment) "to the use of *Owen Evans* and his assigns during his life without impeachment of waste." That is one indication of the intention to give him only a life estate. No doubt it has been held that the permission to commit waste is not alone sufficient to exclude the application of the rule. Then follow other life estates, and after the death of the survivor a general power of appointment by will to *Owen Evans*, and in default of such appointment "to the use of such person or persons as at the decease of the said *Owen Evans* shall be his heir or heirs-at-law, and of the heirs and assigns of such person or persons." If it were not for the use of the word "heirs" the case would be governed by the decision in *Archer's Case* (1). But the singular word "heir" is not alone used, the words are "shall be his heir or heirs." Summing up the several indications that those words point to a particular person to be ascertained at the death of *Owen Evans*, they are these: (1.) The relief from impeachment of waste which is usually attached to a life estate. (2.) The use of the words "such person or persons." (3.) The very significant expression "as at the decease of the said *Owen Evans* shall be his heir or heirs at law"—which certainly point to some individual or individuals to be then ascertained, and not to the whole line of heirs of *Owen Evans in infinitum*; and adding to these indications (4.) the last words, "and of the heirs and assigns of such person or persons," it seems to me that the intention of this deed to designate a particular person or persons who are to be contingent till the death of *Owen Evans*, and who may then be one individual or several coparceners, is almost irresistible. It is quite true that each of these several indications standing alone has been considered insufficient where the plural word "heirs" was used. The authorities have been mentioned by Lord Justice *Lindley*, and I need not refer to them again. But I can find no case in which all these circumstances have concurred. As matter of construction, I arrive very confidently at the conclusion that the true construction of this deed is to make *Owen Evans* tenant for life only, with a contingent remainder in fee to the person or persons who may be his heir at his death.

(1) 1 Rep. 66 b.

Where the particular intention admits of reasonable doubt, it may be quite right to let the general intention prevail. That has often been illustrated, not only in cases within this rule, but in the very numerous cases in which inartificial words in wills have been construed to create an estate tail. But where there is really no reasonable doubt as to the meaning of the words, such a mode of dealing with limitations seems to me inadmissible.

Solicitors: *Holt Beever & Co.*, agents for *Evans & Stephens, Cardigan; Peacock & Goddard.*

H. C. J.

CHITTY, J.
1892
March 30.

In re CHAWNER'S SETTLED ESTATES.

[1892 C. 139.]

Settled Land—Lease—"Best Rent"—Building Lease—Consideration—"Money laid out"—Part Voluntary Expenditure by Lessee—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 7 *sub-s.* 2, 8 *sub-s.* 1, 13 *sub-ss.* 1, 5, 53.

Past voluntary expenditure by a lessee on buildings comprised in his lease is not a "consideration" in law, which will justify a tenant for life in granting a lease, under sect. 8, sub-sect. 1, of the *Settled Land Act*, 1882, at less than the "best rent" that can be reasonably obtained, as required by sect. 7, sub-sect. 2; neither can such expenditure be regarded as "money laid out," within sect. 7, sub-sect. 2, inasmuch as these words must be taken to refer to money laid out for the benefit of the settled land with direct reference to the grant of the lease.

Adjourned summons.

This was an application by the Rev. *Samuel Bryan Crowther Beynon*, tenant for life of estates settled by the will of the late *Sarah Chawner*, which raised the question whether, in the exercise of the statutory powers of leasing, past voluntary expenditure by a lessee may be taken into account in fixing the "best rent" that can reasonably be obtained, on the grant of a fresh lease, and may also be regarded as "a consideration" on the grant of a building lease.

By an indenture of lease of the 22nd of February, 1889, a dwelling-house, with grounds and meadow land of twelve acres, forming part of the settled land, was demised to one *Septimus Croft* for twenty-one years, from the 24th of June, 1889, at a yearly rent of £180.

In May, 1890, Sir *Stevenson Arthur Blackwood* purchased this lease for £1000, and took a formal assignment of it, from *Septimus Croft*. Subsequently, Sir *S. Arthur Blackwood* expended a sum of about £4000 upon the property included in the lease, in repairs, additions, and improvements; he did this voluntarily, there was no contract in writing between him and the tenant for life on the subject, nor any promise of any sort to induce him to make these improvements.

There was evidence that the property in its improved condition, was worth at least £280 per annum, and it appeared from

an advertisement in the March list of a well-known house agent, that the lessee was willing to part with his interest in the residue of the lease, at a rental of £290 per annum and a premium of £1800.

The lessee had applied to the tenant for life to grant him an extension of his term for a period of ten years at the old rent of £180, and the tenant for life, in consideration of the past expenditure on the buildings by his lessee, was willing to accede to this request, and he now proposed to accept a surrender of the existing lease, and to grant Sir *S. Arthur Blackwood* a fresh lease at £180 per annum for the extended term of twenty-nine years, under sect. 8 of the *Settled Land Act*, 1882, or if the Court should be of opinion that this section did not apply, to give him a fresh lease, at the same rent, for twenty-one years, under sect. 7, sub-sect. 2. This arrangement was objected to by the trustees of the settled land.

E. Beaumont, for the tenant for life :—

Under sect. 13, sub-sects. 1 and 5, of the *Settled Land Act*, 1882, the tenant for life can accept a surrender, and grant a new lease, and in fixing the rent, he may take into account the value of the lessee's interest in the lease surrendered; the lease must however be granted in compliance with the earlier sections, and under sect. 8, sub-sect. 1, which is the one applicable to a lease for more than twenty-one years, past voluntary expenditure by the lessee, in improving the buildings included in his lease, is a "consideration" which may be taken into account in fixing the rent; there is nothing in the section to shew that the building or improvements thus referred to, will not include past expenditure; it was intended that the lessee should reap the benefit of improvements made by him on his landlord's property; then if sect. 8 does not apply, I submit that under sect. 7, sub-sect. 2, a fresh lease can be granted at the old rent, regard being had to the "money laid out for the benefit of the settled land, and generally to the circumstances of the case."

Rowden, for the trustees :—

The trustees consider that the arrangement proposed by the

CHITTY, J. 1892 *In re* CHAWNER'S SETTLED ESTATES.

tenant for life will not secure the "best rent that may be reasonably obtained" for this property. Some qualification must be placed on the wording of the sections relied on by the tenant for life, and it cannot be said in this case, that the past expenditure is any part of the consideration for the proposed extended lease; by the power of leasing given in the *Conveyancing Act*, 1881, sect. 18, sub-sect. 9, the expenditure or improvement must have been made within five years; this is a guide for the interpretation of sect. 8 of the *Settled Land Act*. Again, "consideration" must mean legal consideration; to make a legal consideration you must imply a request, *Lampleigh* v. *Brathwait* (1), and no request was made by the lessee for any extension of his lease prior to the outlay.

[CHITTY, J.:—Mr. *Wolstenholme* in his note to sect. 7, sub-sect. 2, refers (2) to the fact that, under the *Agricultural Holdings (England) Act*, 1883, sect. 43, in estimating the rent it shall not be necessary to take into account, as against the tenant, any increase in the value of his holding arising from improvements made by him. Does not this shew the tendency of the Legislature?]

That provision relates only to a special class of tenants or lessees. Then in sect. 7, sub-sect. 2, any "money laid out" must mean laid out in pursuance of a binding agreement prior to the granting of the lease. *Hood* and *Challis* on the *Settled Land Act* (3), correctly interpret the meaning of these sections.

Beaumont in reply.

CHITTY, J.:—

It is my duty to construe this Act of Parliament, and not to say what I consider a fair and reasonable man might do, if dealing with his own property. [His Lordship, having stated the facts, continued:—]

The question which I have to answer is, whether the transaction, which I have thus shortly stated, is within the power of the tenant for life, under the *Settled Land Act* of 1882. The

(1) Sm. L. C. 9th Ed. vol. i. p. 153. (2) 6th Ed. p. 250.
(3) 3rd Ed. p. 202.

53rd section enacts that "a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." It is plain that he cannot exercise the powers thus committed to him (and very extensive powers they are) for the purpose of conferring a benefit upon a stranger, or on any person towards whom he may happen to have a friendly feeling or sympathy. He must act reasonably, as a trustee would do.

The two material sections, besides the one I have mentioned, are the 7th and 8th. The best way, I think, of considering the question is to take the 8th section first. Recourse must be had to that section to give effect to the grant of an extended lease as proposed. The first sub-section of that section enacts that "Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with building purposes." The improvements made by Sir *Arthur Blackwood* are in connection with the "building purposes."

It has been argued by the tenant for life, who is willing to accede to the request of Sir *Arthur*, if he lawfully can, that the words "in consideration of the lessee having erected buildings" are to be read as including the case of a past voluntary expenditure by the lessee. On the other hand, it is contended by the trustees, who are here merely to do their duty, that the term "in consideration," is a technical term well known to the law, and is not such as would include a past voluntary expenditure. In my opinion, the contention of the trustees is right. I am bound, in my opinion, to read the words "in consideration" as importing a consideration in law; and a past voluntary expenditure, which, in other words, is an expenditure not made on request, or not made in pursuance of any agreement, is not a consideration in law.

CHITTY, J. 1892 *In re* CHAWNER'S SETTLED ESTATES.

That being so, I hold that the case does not fall within the 8th section, so far as it is necessary to have recourse to it.

The 7th section will not justify a lease for a longer period than twenty-one years. The second sub-section is worded somewhat differently from the 8th section. It runs: "Every lease shall reserve the best rent that can reasonably be obtained, regard being had," first, "to any fine taken," that means a fine taken on the occasion of the transaction of granting the lease; secondly, "to any money laid out"; and, thirdly, "to money to be laid out for the benefit of the settled land"; and, lastly, "and generally to the circumstances of the case."

It is said, for the tenant for life, that the words "any money laid out" are to be taken literally, and that they, in their literal sense, would include past voluntary expenditure. It is clear that the words "to be laid out for the benefit of the settled land" import some binding obligation on the part of the lessee to lay the money out; and the question remains whether I can take the words "any money laid out" in the wide sense contended for. In my opinion, it is necessary so to read the section as that those words do not import a past voluntary expenditure of money. That some limitation must be placed on the words of the section is obvious. For instance, supposing in this case the property was now in the possession of the tenant for life, and he was minded to grant a new lease to some person, who, I will suggest, stood in relation towards him, that made him willing to confer a benefit on the intended lessee. Say the proposition was to make a lease to his son. Could he, in such a case as that, have regard, for the purpose of diminishing the rent which would otherwise be the "best rent" that could be reasonably obtained, to the circumstance that at some former time money had been laid out on the land for the benefit of the settled land? In my opinion, it is clear that he could not. That case, therefore, is quite sufficient to shew that the words cannot be taken in the wide meaning that the argument of the tenant for life seeks to attribute to them. It appears to me that the money must be laid out with reference to the granting of the lease. As I said, the fine is a fine to be taken on the occasion of the transaction, so the money hereafter to be laid out must be under an obli-

gation imposed, by the transaction of lease, on the tenant. Therefore, I consider that I must put some reasonable interpretation upon the term "money laid out," and that a reasonable interpretation will not include a voluntary past expenditure.

Again, I am at liberty to read the 8th section as being part of the same Act. Under the 8th section although the term may be a long building term, yet under that section it may be much less than the authorized term; and I have put what appears to me to be the only proper construction on the 8th section. That reflects light upon the true meaning of the 7th section. It really comes to this, that the tenant for life, being a trustee of the power for all the persons interested under the settlement including himself, cannot give away the land; and in the circumstances of this case, speaking in legal language, what is proposed to be done is, in substance, to make a gift of a ten years' term to Sir *Arthur Blackwood* at an inadequate rent of £180 a year.

During the argument I referred to the *Agricultural Holdings (England) Act*, 1883, sect. 43, which is a section not creating a new power, but applying certain principles recently introduced into some legislation as to the exercise of existing powers; and no doubt, under that 43rd section the landlord, who is exercising the power of leasing, which is vested in him, though he is bound by that power to reserve the best rent, is specially exempted from the necessity of taking into consideration, as against the tenant of the holding, the improvements which that tenant may have made. But that is a special legislation standing by itself; and I cannot find any legitimate reason for applying a somewhat similar principle to the *Settled Land Act* of 1882, which does not deal merely with agricultural land, but with houses and other property upon it. The result therefore is, that my opinion is adverse to the arrangement proposed by the tenant for life.

Solicitors: *Park Nelson, Morgan, & Gemmell.*

W. C. D.

CHITTY, J. 1892 April 1.

LUBBOCK *v.* BRITISH BANK OF SOUTH AMERICA.

[1892 L. 884.]

Company—Dividends—Sale of Part of the Undertaking—Accretion to Capital—Capital or Profits—How Profits are to be ascertained.

A banking company with a paid-up capital of £500,000, sold part of its undertaking for £875,000; after deducting the paid-up capital and other incidental expenses there remained a net balance of £205,000; the directors proposed to treat this balance as profit :—

Held, that the £205,000 was profit on capital, and not part of the capital itself, and that the directors would be justified in carrying this sum to the profit and loss account, and after appropriating to the reserve fund so much as they thought proper, might distribute the remainder as dividends.

Principles on which the accounts of a trading company should be kept stated.

MOTION.

The question raised by this application was whether a sum of £205,000 arising from the sale and re-purchase of part of the undertaking of the Defendant company, the *British Bank of South America, Limited*, was to be treated as an accretion to capital, or as profits. The facts, so far as material, were as follows :—

The company was incorporated in 1863 with a capital of £1,000,000, divided into 100,000 shares of £10 each. All the shares had been issued, and £5 had been paid upon each share. Part of the company's undertaking consisted of a banking business in *Brazil*, with houses and other assets. In 1891 an agreement was entered into with a Brazilian bank, by which the company sold its undertaking in *Brazil* for £875,000, and entered into a covenant not to compete with the purchaser in banking business in *Brazil*.

In July, 1891, the £875,000 was paid. Subsequently, the company entered into another agreement with the Brazilian bank, under which they purchased a release of the covenant restraining them from carrying on a banking business in *Brazil*, for £75,000.

The result of these transactions was, that after deducting the

£75,000 so paid to the Brazilian bank, and £500,000, the paid-up capital, and after making various incidental payments for commissions, compensation, &c., there remained a net balance of £205,000.

On the 10th of July, 1891, a circular had been sent round to the shareholders, which, after informing them of the satisfactory sale of part of the company's business, contained the following passage: "After payment of the bonus proposed, the bank's position will be as under—Uncalled capital, £500,000; capital paid-up, £500,000; capital reserve fund (about), £350,000; general reserve fund, £75,000."

On the 24th of March, 1892, the directors passed a resolution that the profit derived from the sale and re-purchase of the bank's business in *Brazil*, be treated as profit, and be carried to the profit and loss account of the bank, and dealt with accordingly. The Plaintiff, on behalf of himself and the other shareholders, thereupon commenced a friendly action against the company, and now moved for an injunction restraining the company from acting upon, or carrying into effect, this resolution, and from dealing with or otherwise distributing, this sum of £205,000 as if it were income of the company.

The following clauses in the articles of association, were referred to:—

(29.) "The directors shall be at liberty, if they shall from time to time see fit so to do, to appropriate out of the profits of the bank, in any year such an amount as in their discretion they shall think proper, and add the same to the reserve fund; and the reserve fund may be applied for equalizing dividends, effecting repairs, or meeting extraordinary expenses, and, at the discretion of the directors, for any other purposes of the bank."

(176.) "All dividends on shares, other than a dividend on account, shall be declared by the ordinary meetings, and no dividend shall exceed the sum recommended to the meeting by the board."

Whitehorne, Q.C., and *S. Dickinson*, for the Plaintiff:—

What has been sold is part of the capital and assets of the company, and therefore what is received over and above the

CHITTY, J. 1892 LUBBOCK v. BRITISH BANK OF SOUTH AMERICA.

£500,000 paid-up capital is an accretion to capital and must be kept intact. To carry over the £205,000 to the profit and loss account is *ultrà vires* the company; it is clearly stated by Lord Justice *Lopes* in *Lee* v. *Neuchatel Asphalte Company* (1), that where owing to extraneous circumstances the capital is increased in value, that increase may not be dealt with as revenue or profits. [*Frames* v. *Bultfontein Mining Company* (2) was also referred to.]

We also say that what the directors propose to do is *ultrà vires*.

Having regard to the statements contained in its circular of the 10th of July last, which shew that the surplus was to be treated as capital reserve fund, it is not competent for the directors to act on the resolution they have just passed.

Byrne, Q.C., and *Method*, for the Defendant company, were only called upon on the question whether the proposed payment of a dividend out of this balance was *ultrà vires* the directors. They referred to articles 29 and 176 and were stopped.

CHITTY, J. (after referring briefly to the argument of the Plaintiff, and stating the facts, continued):—

The result, therefore, is that this company has made a sale, authorized by law, of a certain portion of its assets, and that after making that sale, and duly providing for all its liabilities, and taking into account its other assets, there remains to the good a surplus of £205,000. It was argued for the Plaintiff that this was not profit; therefore the company itself could not treat it as profit, and further, that as between the company and the directors, the directors could not treat it as profit, supposing the company could. I have some difficulty in following these arguments.

This is a trading company, and I have before me a balance sheet of 1891, to which I refer by way of illustration, to shew how the accounts of such a banking company are kept, and properly kept, in my opinion. I have before me the Defendant company's accounts up to December, 1890. They put down on the one side their liabilities, treating properly the £500,000,

(1) 41 Ch. D 1, 26. (2) [1891] 1 Ch. 140.

which has been subscribed by the shareholders, as a liability, for the purposes of bringing it into account, as against the assets which they put down on the other side. Then on the same liability side they properly put their current liabilities, and certain other liabilities and reserve fund, which the company, according to its constitution, is justified in making, and they add up the total amount of those liabilities. On the other side they put down their assets, and for the purpose of giving information to the shareholders, they divide the assets into certain heads, "cash at bank," "bank premises, and managers' residences in *Brazil* and *River Plate*," and then they add up the total on that side. They, of course—because there is not a suggestion that these accounts are not kept with perfect propriety and perfect honesty—therefore put down on the assets side the money value of their assets, some being in money itself and some not. Then when the two sides of this account are compared, there is a surplus of £44,000 shewn, which goes, according to the accountant's regular method of keeping accounts, to the liability side, and represents the balance of assets over liabilities. Now what is the result of keeping an account in this form? The capital of the bank is intact, and the account shews it, and after providing for the capital, there remains a surplus which rightly goes to the profit and loss account. All that the company is required to do, by force of the *Companies Act* of 1862 is, to keep its capital intact, and not to pay dividends out of its own capital; in other words, to keep that capital for its creditors, and any others who may be concerned therein. That mode of keeping the account is an excellent illustration of the right way to divide profit and loss. Taking the figures on this account, this sum of £44,000 is profit made, and profit available within the Act of 1862 for division among the shareholders, unless there is something in the articles which would prevent the directors, and prevent the company, from dividing the sum which thus stands to their credit.

I say I have great difficulty in following the first portion of the argument for the Plaintiff, because it was said that what was sold was part of the capital of the company, and that what came in over and above the £500,000 was an accretion to capital,

CHITTY, J. 1892 LUBBOCK v. BRITISH BANK OF SOUTH AMERICA.

therefore it must be kept intact as part of the capital. That has, with great respect to the counsel who put forward this argument, nothing to do with the matter. The sale being an authorized sale, it is immaterial what is the thing sold. I put during the argument a humble illustration. A man's business is to make boots and shoes. He has £10,000 which he takes into that business as his capital. He makes boots and shoes, and spends the whole of his £10,000 in doing it, and he sells and gets back from his customers a certain sum on the sale. He compares then, assuming he has sold all, what he has got back with his expenditure in producing the boots and shoes, and putting them on the market, and if he finds he has his £10,000 (I am treating it apart from any question of debts outstanding, supposing it is a good solid sale) then his capital is intact, and the rest, if there is a rest remaining in his hands, is profit. On the other hand, if he has only £9000 his capital is not intact, and he has lost. It is exactly the same principle that has to be applied to a trading company under the *Companies Act*, and the capital that has to be regarded for the purpose of the Act of Parliament is the capital according to the Act and not the things, whether houses, goods, boots and shoes, or hats, or whatever it may be for the time being representing the capital, in the sense of being things in which the capital has been laid out. Where the company is formed to work a wasting property, such as a mine or a patent, different considerations may apply, as was decided in *Lee* v. *Neuchatel Asphalte Company* (1): I am not dealing with any such special case.

The result, therefore, is to my mind plain, that on the facts of this case, £205,000 is profit. Now, I turn to the articles of the company, and I find with regard to the dividends that the 176th article provides that "All dividends on shares, other than a dividend on account, shall be declared by the ordinary meetings, and no dividend shall exceed the sum recommended to the meeting by the board." The article proceeds on the footing that the books of the bank are properly kept, as to which, without the fear of being mistaken, I say there is no question and no suggestion. That requires that the capital of the bank should

(1) 41 Ch. D. 1, 26.

be intact; and, in this case, applying that article to the actual facts of the case, that means the £500,000, neither more or less. Then comes article 29 which provides for the creation of a reserve fund: the directors propose to act on article 29, and to appropriate out of the profits of this bank, such an amount as they shall think proper, and add the same to the reserve fund. But according to the constitution of the bank this £205,000, being a profit, has first to be carried to the profit and loss account. Then the directors if they should think fit, would be entitled under article 29 to attribute a portion of it to the reserve fund, and the balance will be an available sum for dividend; the directors will make a proposal to the meeting, which is about to be held, and if their proposal is accepted the meeting will pass the resolution authorizing the dividend, and it will be a dividend out of this £205,000, or so much as shall not have been appropriated by the directors themselves to the reserve fund.

All this to my mind is plain, and I cannot find any ground on which the proposition, which was advanced in a friendly manner by the Plaintiff, can be sustained, except possibly on the ground of the circular of the 10th of July, 1891, upon which it was said, that it amounted to a representation by the directors to the members of the company, which precluded them from dealing with this £205,000 by passing it to the profit and loss account, because it was alleged that the directors had called it capital reserve fund. There is really nothing in this argument; the circular was only a statement of what the result of the sale was expected to be. In my opinion the directors will be justified in acting upon the resolution which they have passed, and in carrying this sum of £205,000 to the profit and loss account and then dealing with it in accordance with the articles. Therefore I refuse the motion.

[This application was subsequently by consent treated as the hearing of the action, which was set down and dismissed.]

Solicitors: *Janson, Cobb, Pearson, & Co.; Budd, Johnsons, & Jecks.*

W. C. D.

NORTH, J.

1892

March 22.

In re MERCANTILE BANK OF AUSTRALIA.

[1892 M. 089.]

Company—Winding-up Petition—Appointment of Provisional Liquidator—Official Receiver—Fixing of Security by Board of Trade—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 4, *sub-ss.* 1, 2, 5; *s.* 31, *sub-s.* 3; *s.* 32, *sub-s.* 3—*Companies (Winding-up) Rules*, 1890, *rr.* 32, 67.

Whether, under sect. 4 of the *Companies (Winding-up) Act*, 1890, the Court has power to appoint as provisional liquidator of a company, before a winding-up order has been made, any other person than the Official Receiver, *quære.*

But, assuming that there is power to appoint another person, as a general rule the Official Receiver will be appointed.

Under rule 67 of the Companies (Winding-up) Rules, 1890, the Board of Trade has power to fix the security to be given by the liquidator of a company before as well as after the making of a winding-up order.

By virtue of sect. 32, sub-sect. 3, of the *Companies (Winding-up) Act*, 1890, that Act applies to a company which has not a registered office in *England*, but has carried on business there.

PETITION by a creditor for the winding-up of the *Mercantile Bank of Australia* by the Court. The petition was intituled, In the Matter of the *Companies Acts*, 1862 and 1890.

The company was in June, 1877, incorporated under the *Companies Statute*, 1864, of the Legislature of the Colony of *Victoria*, in *Australia*, as a company limited by shares. The company's head office was situate in *Melbourne*, *Victoria*.

The petition stated that "the registered office of the company for the purposes of the *Companies (Winding-up) Act*, 1890, is situate at No. 39, *Lombard Street*, in the city of *London*."

The nominal capital of the company was £1,000,000, in 200,000 shares of £5 each, of which 195,500 shares had been issued. In November, 1886, the company appointed local directors in *London*, and vested in them power to carry on the business of a branch or agency of the company in *London*. Since 1886 the office of the company in *London* had been and it was still situate at No. 39, *Lombard Street*, which was its only place of business in the *United Kingdom*. Of the shares, 45,000 were held in *England*, and upon the greater part of these shares there was a

liability of £3 per share. The company had assets of considerable value in *England*. The company had suspended payment both in *Australia* and in *London*.

On the 11th of March, immediately after the presentation of the petition, the Petitioner applied by motion for the appointment of a provisional liquidator, and an order was made appointing *G. W. Booker* (the manager of the company in *England*) and *A. E. S. Guinness*, provisional liquidators. The order was made upon the undertaking of the Petitioner to be answerable for the receipts of *Guinness*, until he should have given security as by the order directed. The order (as drawn up by the Registrar) went on to direct that *Booker* and *Guinness* should forthwith give security, and that all moneys to be received by them should be paid by them to the Company's Liquidation Account at the *Bank of England*. And "the Court did thereby limit and restrict the powers of *Booker* and *Guinness*, as such provisional liquidators, to the following acts—that is to say, to take possession of, collect, and protect the assets of the bank; but not to distribute or part with the same until further order."

The order was not passed and entered by reason of difficulties raised by the Board of Trade. The Board considered that the Court had no power to appoint as provisional liquidator any one but the Official Receiver. The Board also declined to fix the security to be given by the provisional liquidators, on the ground that rule 67 of the Companies (Winding-up) Rules, 1890, applied only after a winding-up order had been made by the Court. The following letter was on behalf of the Board of Trade addressed to the Petitioner's solicitors:—

"I am directed by the Inspector-General in Company Liquidation to acknowledge the receipt of your letter of the 11th inst., and, in reply, to point out that the provisions of the *Companies (Winding-up) Act* with reference to the furnishing of security to the Board of Trade only appear to apply where a liquidator has been appointed after the making of a winding-up order. In these circumstances, it does not appear to be within the functions of the Board of Trade to fix the security in this case. With regard to the banking account, the same observations appear to apply as in the question of security. I am to

NORTH, J.
1892
In re MERCANTILE BANK OF AUSTRALIA.

suggest that you should at once see the Chief Clerk, and take his directions as to the course to be pursued in view of the above considerations."

Under these circumstances the petition was placed in the paper to-day. The counsel both for the Petitioner and for the company admitted that, having regard to sect. 32, sub-sect. 3, of the *Companies* (*Winding-up*) *Act*, 1890, they could not argue that that Act did not apply to the company.

Cozens-Hardy, Q.C., and *Elgood*, for the Petitioner :—

We ask that the petition may stand over until it shall be known what course the shareholders in *Australia* have resolved to adopt. But, inasmuch as bills payable to the bank will be maturing in the interval, it is necessary that a provisional liquidator should be appointed to protect the assets. By sect. 85 of the *Companies Act*, 1862, power was given to the Court, at any time after the presentation of the petition, and before the first appointment of liquidators, "to appoint provisionally an official liquidator of the estate and effects of the company." And by sect. 92, "the Court may also determine whether any and what security is to be given by any official liquidator on his appointment." This clause of sect. 92 is expressly repealed by sect. 33 of the Act of 1890, and the matter is now regulated by sect. 4 of that Act, and by rules 32 and 67 of the Companies (Winding-up) Rules, 1890 (1). Sect. 4, sub-sect. 5, and rule 32, sub-rule 1, do

(1.) Sect. 4 (1): "On an order being made by the Court for winding up a company, the officer hereinafter mentioned shall, by virtue of his office, become the provisional liquidator of the company, and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such."

(2.): "The said officer shall be the Official Receiver, if any, attached to the Court for bankruptcy purposes, or if there is more than one such Official Receiver, then such one of them as the Board of Trade may appoint, or, if there is no such Official Receiver, then an officer appointed for the purpose by the Board of Trade. Any such officer shall for the purpose of his duties under this Act be styled the Official Receiver."

(5.): "The Official Receiver may be appointed by the Court provisional liquidator of the company at any time after the presentation of the petition, and before a winding-up order has been made."

Sect. 31 (3): "This Act shall not apply to any company unless the registered office of the company is situate in England or Wales."

Sect. 32 (3): "For the purposes of

not make it imperative on the Court, if it appoints a provisional liquidator before a winding-up order is made, to appoint the Official Receiver. The Court may appoint him, but it may, if it thinks fit, appoint some one else: *In re Unionist Club* (1). It would be very inconvenient in such a case as the present that the Official Receiver should be appointed, and his appointment would lead to more expense; for, under the Order as to fees of the 18th December, 1890, he would be entitled to a percentage on the estimated value of the company's assets. If the shareholders in *Australia* decide upon a reconstruction of the company, it may not be necessary to make a winding-up order. If there is a winding-up in the colony, it will be desirable to have an ancillary order made by this Court, such as was made in *In re Commercial Bank of South Australia* (2), or such as Mr. Justice *Kay* indicated in *In re Matheson Brothers* (3). The Official

---

this Act, the expression 'registered office of a company' shall mean the place which has been the registered office of the company for the greater part of the six months immediately preceding the presentation of the petition for winding up the company, and shall include, in the case of an unregistered company, any place which in pursuance of sect. 199 of the *Companies Act*, 1862, is to be deemed the registered office of the company for the purpose of the winding up thereof."

By the Companies (Winding-up) Rules, 1890:—

Rule 32 (1): "After the presentation of a petition, upon the application of a creditor, or of a contributory, or of the company, and upon proof by affidavit of sufficient grounds for the appointment of the Official Receiver as provisional liquidator, the Court may, if it thinks fit, and upon such terms as may be just, make such appointment."

Rule 67: "In the case of a special manager or a liquidator other than the Official Receiver the following rules as to security shall be observed, namely":—(*inter alia.*)

(1.) "The security shall be given to such officers or persons and in such manner as the Board of Trade may from time to time direct.

(2.) "It shall not be necessary that security shall be given in each separate winding up; but security may be given either specially in a particular winding up or generally to be available for any winding up in which the person giving security may be appointed either as liquidator or special manager.

(3.) "The Board of Trade shall fix the amount and nature of such security, and may from time to time, as they think fit, either increase or diminish the amount of special or general security which any person has given."

(1) W. N. (1891) 64.

(2) 33 Ch. D. 174.

(3) 27 Ch. D. 225.

NORTH, J. 1892 *In re* MERCANTILE BANK OF AUSTRALIA.

Receiver, if he is appointed, will have greater powers than any other person; it will be his duty to take possession of all the company's books. Mr. *Guinness* is willing to act without salary. The Petitioner is ready to give an undertaking to be answerable for his receipts.

Everitt, Q.C., and *Bramwell Davis*, for the company; and *J. K. Young*, for a creditor; supported the appointment of Mr. *Booker* and Mr. *Guinness*.

R. Burnet Morris, for a shareholder, also supported the application.

NORTH, J.:—

I accede to the application that the petition may stand over to the Easter sittings. The question then arises, what ought to be done as to the appointment of a provisional liquidator in the meantime. My order of the 11th of March was made under the belief that the Act of 1890 did not apply to this company, because it has not a registered office situate in this country. But now, having regard to sub-sect. 3 of sect. 32 of the Act, to which my attention was not then directed, I think the Act does apply to this company. Now, sect. 85 of the *Companies Act*, 1862, empowered the Court, at any time after the presentation of a winding-up petition, and before the first appointment of liquidators, to appoint provisionally an official liquidator. Then sect. 92 empowered the Court to appoint, either provisionally or otherwise, an official liquidator or liquidators, for the purpose of conducting the proceedings in winding up a company, and it provided that "the Court may also determine whether any and what security is to be given by any official liquidator on his appointment." By the Act of 1890, the latter words are repealed. Then sect. 4, sub-sect. 1, of that Act provides, that, on an order being made for winding up a company, the Official Receiver "shall, by virtue of his office, become the provisional liquidator of the company." In the present case that time has not yet been reached, a winding-up order not having been made as yet. Sub-sect. 5 makes provision for the period which is not covered by sub-sect. 1, viz., the interval between the presentation of the

petition and the making of a winding-up order, and it provides that "the Official Receiver may be appointed by the Court provisional liquidator of the company at any time after the presentation of the petition, and before a winding-up order has been made." It has been suggested that the power there conferred on the Court is only an optional one, and that the Court can either appoint or refrain from appointing the Official Receiver provisional liquidator, but that it cannot appoint as provisional liquidator any other person than the Official Receiver. There is another possible alternative; the Court might refuse to appoint any provisional liquidator at all. Sect. 11 has not, I think, any application at the present stage of the proceedings; it applies after a winding-up order has been made. Then we come to the Rules of 1890. [His Lordship read rule 32, sub-rule 1, and rule 67, and continued:—]

It appears by the letter from the Board of Trade, which has been read, that they consider that rule 67 applies only after a winding-up order has been made, and that that rule confers on the Board no power to fix the security to be given by a provisional liquidator appointed before the making of a winding-up order. I cannot see any reason why the rule should not apply before, as well as after, the making of a winding-up order. If a provisional liquidator is appointed before the making of a winding-up order, how is the nature and amount of his security to be fixed? If the Board of Trade are right in their view of the construction of the rule, they have no power to fix the security, and the Court has no power to do so, for no express power is given to it by the Act of 1890; and the power which it had under the Act of 1862 has been expressly repealed by the Act of 1890. Then the question arises, what ought I to do in the present case? I can see no reason why the Official Receiver should not be appointed provisional liquidator. I am not at present prepared to go the length of saying that no other person can be appointed; I leave this point open for future consideration: my present view is that the Court has power to appoint any other suitable person. But the whole scope of the Act and the Rules points to this, that, as a general rule, the Official Receiver is to have the management of the winding-up of

NORTH, J. companies. The appointment of a provisional liquidator implies
1892 that, in all probability, a winding-up order will afterwards be made,
In re in which case the Official Receiver would become provisional
MERCANTILE BANK OF AUSTRALIA. liquidator, and would as a general rule be appointed official liquidator. I can see no reason in the present case for departing from what I may call the normal course of appointing the Official Receiver provisional liquidator, when a winding-up order has not been yet made. If any person other than the Official Receiver is appointed, his appointment will necessarily come to an end on the making of a winding-up order, for the Official Receiver will thereupon become provisional liquidator. Why, then, should not the Official Receiver be appointed provisional liquidator during the interval before the making of a winding-up order? It is suggested that he will have a much greater power than any other person of interfering with the management of the business of the company. He will not have anything of the sort. Whatever directions I might think right to give in the case of any other person whom I appointed, I should equally give in the case of the Official Receiver. He will have no greater powers than any other provisional liquidator would have. Then it is said that much greater expense will be caused by the appointment of the Official Receiver, by reason of the percentage to which under the Rules he is entitled upon the assets which he receives. This remark is probably correct. But, if the Official Receiver is considered by the Legislature a proper person to be appointed provisional liquidator before the making of a winding-up order, I do not see why the consequence that he will be entitled to the remuneration fixed by the Rules should not follow. I do not think that the expense is a sufficient reason for not appointing him in the present case. So far as appears, it is not likely that he will have to receive more than £10,000 before the petition comes on for hearing again, and the percentage upon that sum will not exceed £100.

With regard to the powers which the Official Receiver is to exercise, I think my former order, with some modification, will provide all that is necessary. As I am appointing the Official Receiver, nothing need be said about his giving security. The question has been raised whether his powers ought to be limited

with regard to a bill of exchange for £40,000 which will be receivable on the 9th of May. In all probability the petition will come on for hearing again before that day, and therefore I think it unnecessary to make any special provision as to that bill at present. But, in case the hearing of the petition should be delayed beyond that day, I will reserve liberty to any of the parties to apply in regard to that bill. I think the powers of the Official Receiver should be limited, as they were in the draft of my former order, with this addition, that he may discharge the current rent of the company's office and the current salaries of the officers and clerks and other persons employed by the company, and such other current expenses as he may think it necessary to pay. He must also be authorized to give such notices as he may be advised to determine if necessary the employment of the officers and servants of the company.

Solicitors: *Powell & Burt; Crawford & Chester; Wadeson & Malleson; H. C. Morris.*

W. L. C.

In re KEMEYS-TYNTE.
KEMEYS-TYNTE *v.* KEMEYS-TYNTE.

[1891 K. 960.]

Mining Lease—Contract—Tenant for Life impeachable for Waste—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 11, 12.

The owner of an estate contracted to lease coal to be worked by instroke from adjoining mines in the occupation of the intended lessees. The owner died before his coal was reached or the leases granted:—

Held, that the tenant for life, under his will, though impeachable for waste, was entitled to the rents and royalties.

Sect. 11 of the *Settled Land Act*, 1882, does not apply to a mining lease granted by a tenant for life for giving effect to a contract entered into by a predecessor who was absolute owner.

THIS was an originating summons to determine certain questions arising upon the effect of the will of Colonel *Charles Kemeys Kemeys-Tynte*, who died on the 10th of January, 1891.

One of the questions was whether a tenant for life of real estate,

NORTH, J.

1892

In re KEMEYS-TYNTE. KEMEYS-TYNTE *v.* KEMEYS-TYNTE.

impeachable for waste, under his will, was entitled to the dead rents and royalties of coal mines.

The testator was (subject to certain incumbrances) entitled to appoint and deal with an estate called the *Unsettled Cefn Mabley Estate, Glamorganshire*, which included the entirety of a piece of land (and the minerals thereunder) ninety-eight acres in extent, and a moiety of other land and the minerals thereunder seventy acres in extent, of the other moiety of which the representatives of the late Mr. *Crawshay Bailey* were the owners.

By an agreement between the testator and a colliery firm dated January, 1885, and certain subsequent agreements binding on the testator, it was contracted that the testator should grant a mining lease of the coal under the ninety-eight acres for a term of sixty years from the 1st of May, 1884, to the *Ocean Coal Company, Limited*, that he should join with the representatives of the late Mr. *Crawshay Bailey* in granting a lease for the same term of the coal under the southern portion of the seventy acres to the *Ocean Coal Company*, and a lease for the same term of the coal under the northern portion of the seventy acres to the *Penrhihyber Company*. Under the lease of the ninety-eight acres in addition to royalties, a dead rent of £280 was to be paid to the testator after the fifth year, and a smaller dead rent for earlier years. Under each of the other leases the testator was to receive after the fifth year a moiety of £120 a year as dead rent, in addition to a moiety of royalties. No surface rights were to be given to the lessees; but the respective lessees were to work the coal granted to them by means of adits driven from adjoining mines in the occupation of the respective lessees.

The testator appointed the three Plaintiffs to the summons executors and original trustees of his will; he appointed the *Unsettled Cefn Mabley Estate*, subject to the charges affecting the same upon trust out of the rents and profits thereof to pay a certain annuity, and, subject as aforesaid, he declared that his trustees should hold the *Unsettled Cefn Mabley Estate* in trust for his eldest son *Halswell Milborne Kemeys-Tynte* for life, with remainder in trust for his eldest son *Charles Theodore Halswell Kemeys-Tynte* for life with remainder in trust for the first or other sons of the latter successively in tail male with remainders over.

During the testator's life the dead rent was paid in respect of all the coal, and the testator received his share of the same. Since his death his executors received dead rent. The *Penrhihyber Company* commenced drift working in their adjoining mine with a view to get the coal under the northern portion of the seventy acres, and the *Ocean Coal Company* commenced drift working in their adjoining colliery with a view to get the coal agreed to be leased to them. Such drift working had been continued since the testator's death, but in neither colliery had the working quite reached the coal under the testator's land.

The Plaintiffs to the summons were the trustees of the will. The Defendants were the equitable tenant for life in possession under his will, and persons interested in another question.

During the testator's life a lease of the coal under the northern portion of the seventy acres to the *Penrhihyber Company* in accordance with the agreements was duly executed. Leases were prepared of coal under the ninety-eight acres, and the southern portion of the seventy acres, in accordance with the agreements during the testator's lifetime, but were not executed. It was intended that such leases should be executed by the tenant for life under the testator's will under the provisions of the *Settled Land Acts*, 1882 to 1890.

The question for the decision of the Court as to the coal, was what parts of the dead rents and royalties payable under the leases already granted or intended to be granted, ought to be paid to the Defendant *Halswell Milborne Kemeys-Tynte* as equitable tenant for life.

Everitt, Q.C., and *Kingdon*, for the trustees:—

The tenant for life can under sect. 12, sub-sect. 1, of the *Settled Land Act*, 1882, or under sect. 6 of the Act of 1890, carry out the contract made by the testator, though he could not have granted a lease himself in such wide terms.

[NORTH, J.:—Sect. 6 of the Act of 1890 does not apply to leases.]

But he is not entitled to the whole rents and royalties as part of the income in cases where a lease either was or was not granted

NORTH, J. 1892 *In re* KEMEYS-TYNTE. KEMEYS-TYNTE *v.* KEMEYS-TYNTE.

by the testator. The test is whether the mine was opened in the life of the testator; no mine has been opened here even now: *Stoughton* v. *Leigh* (1); *Elias* v. *Snowdon Slate Quarries Company* (2); *Dickin* v. *Hamer* (3).

The intended lease when granted by the tenant for life will come into operation under the *Settled Land Act*, 1882; therefore the provisions of sect. 11, which are not limited in terms, apply, and the tenant for life impeachable for waste will be entitled only to one-fourth of the rent and royalties.

Cozens-Hardy, Q.C., and *Bramwell Davis*, for the Defendants:—

The mines are being and are to be worked under a contract made by the testator; the rents and royalties are payable under that contract, and have by him, therefore, been impressed with the character of income, and belong to the tenant for life: *Campbell* v. *Wardlaw* (4). *Stoughton* v. *Leigh* (5) is an authority in favour of the tenant for life, shewing that the widow in that case, not being dowable out of the minerals in lease, took her share of the rent and royalties as incident to the reversion.

As to the point on sect. 11 of the *Settled Land Act*, 1882—

[NORTH, J.:—I do not wish to hear you on that. I think that the leases, when granted, will be in exactly the same position as if they had been granted by the predecessor, who made the contract himself.]

Everitt, in reply.

NORTH, J. (after stating the facts and reading sect. 12, subsect. 1, of the *Settled Land Act*, 1882, continued):—

I have not examined the exact terms of the contract; but, assuming for this purpose that it did contain something that could not have been inserted in a lease made by a tenant for life under the *Settled Land Act*, I am of opinion that the tenant for life can now grant a lease with such terms and having exactly the same effect as if it had been granted by the testator.

(1) 1 Taunt. 402, 410.
(2) 4 App. Cas. 454.
(3) 1 Dr. & Sm. 284.
(4) 8 App. Cas. 641, 649, 655.
(5) 1 Taunt. 402.

in all respects, a valid contract having been made to that effect by the settlor who was owner in fee.

The question then is, What is the effect of such lease under which the tenant was to have had the right to possession some time before the testator died, and a dead rent and royalties were to be paid? The tenants have had the benefit of the intended leases for some time, and, as matter of fact, have paid dead rent; but, by reason that the mines were to be worked by instroke, though the operation of tunnelling has proceeded continuously, the workings have not yet reached the confines of the testator's property. In that sense the mines are not yet opened. The testator received dead rent, and since his death the trustees have received dead rent; and there will shortly be royalties payable in addition. Who is entitled to these sums? In my opinion the tenant for life is entitled to the whole of them. If, the day before the testator's death, the coal had been reached, it is conceded that the tenant for life would have been entitled to the whole rent and royalties; and what difference can it make in principle whether the coal was reached a day before or a day after the testator died? The leases were created by the act of the testator, who was owner in fee, and whatever he would have taken as income in my opinion, the person who has a right to the income is entitled to receive, including the dead rent and royalties accruing during his life tenancy.

I do not wish to multiply references to authorities when there are so many in the books. One such case is that of *Daly* v. *Beckett* (1). There an estate with the mines and minerals was settled, and power was given to the trustees to demise the hereditaments, and the coal, and minerals, but so as the lessees should not be dispunishable for waste. It was held that the last clause was repugnant, and that the trustees might demise mines, both opened and unopened, at the date of the settlement: and, also, that the royalty reserved was in the nature of rent, and was payable to the tenant for life, and did not form corpus, and included royalties under leases not existing at the time of the settlement. The Master of the Rolls says (2): "With respect to the second point, as to how the produce of the mine is to be

(1) 24 Beav. 114. (2) 24 Beav. 123.

NORTH, J. 1892 *In re* KEMEYS-TYNTE. KEMEYS-TYNTE *v.* KEMEYS-TYNTE.

considered, I must treat it, if I am right in my view as to the first point of the case, as if this were an ordinary power to lease the mines and minerals, in which case all the authorities establish this: that the produce of the mines is made part of the annual profits of the estate, and whether in royalties, or in whatever other way it is produced, it forms part of those profits, and that it is not to be treated like timber cut, where the produce of it is invested, and the interest only is paid to the tenant for life." Then, again, there is a case under a will: *Earl Cowley* v. *Wellesley* (1). The side-note is this: "Rents and royalties of brickfields, one of which had been leased by the testator and the other by the trustees of his will under a power, held to belong to the tenant for life." From the statement of facts, I understand that the field leased by the testator was worked as a brickfield during his life by *William Hill*, the lessee. After the testator's death, his trustees had, in pursuance of an arrangement made by the testator in his lifetime, and under a leasing power contained in his will, granted a lease to the said *William Hill* of an adjoining piece of land also for a brickfield reserving similar rents and royalties; which is precisely the present case, except that it related to brick-earth instead of coal. The Master of the Rolls said: "I think that the lease being made by the trustees makes no difference, and that it is clear, from scope of leasing power, that the leases were intended for the benefit of the tenant for life." There are several other cases of the same import. I do not intend to refer to any other except *Stoughton* v. *Leigh* (2). That is said by Mr. *Everitt* to be in point and binding on me. I assent. I think it is binding on me, and in favour of the tenant for life. The material facts were these. One *John Hanbury* was in his lifetime, at the time of his marriage and at his death, actually seised of divers landed estates, and of several mines of lead and coal—namely, in his own hands, a lead mine, and a coal mine neither opened, wrought, or demised: two lead mines and two coal mines which during the coverture he had demised to tenants for years, reserving pecuniary rents, to be paid whether they did or did not open and work them; and of each sort of these one had been opened before his death by the tenant,

(1) 35 Beav. 638. (2) 1 Taunt. 402.

who still continued now to work it, and the other had not been opened; a lead mine and a coal mine had been demised during the coverture to tenants for years, rendering not pecuniary rents, but quantities of the lead ore and coal when gotten, and the tenants were by the terms of their leases at liberty to work or not to work these mines; the coal mine was at the time of *John Hanbury's* death, and of that action, wrought by the tenant; the lead mine had not been opened; and of two lead mines and two coal mines, which had been opened and were wrought by the deceased himself at the time of his death, one of each sort had, from the time of his death, ceased to be wrought, his heir thinking them unprofitable; the other of each sort the heir continued to work to profit. The deceased was also entitled to the following minerals lying under land which was not his own, but wherein he had purchased of the landowner liberties to work through his land: namely, a mine of coal, and another of lead ore, which he had opened and wrought during the coverture, and was working at the time of his death, since which the heir had ceased to work the lead, but continued to work the coal: a mine of lead, and another of coal, which he had not opened or wrought; a mine of lead, and another of coal, which he had demised to tenants for years, rendering at their own option, which they might annually make, either pecuniary rents or rents in kind, commencing from the time when the mines should be wrought. The lead mine had been opened before the death of *John Hanbury*, and the tenants had paid their rents in ore in kind. The coal mine had not been opened.

The material part of the judgment given in answer to certain questions put by the Court of Chancery (1) is reported thus: "The Court certified to the High Court of Chancery that their opinion upon the questions proposed to them was that the widow of *John Hanbury* was dowable of all his mines of lead and coal, as well those which were in his own landed estates as the mines and strata of lead or lead ore, and coal, in the hands of other persons, which had in fact been open and wrought before his death, and wherein he had an estate of inheritance during the coverture, and that her right to be endowed of them had no

(1) 1 Taunt. 410.

NORTH, J.
1892
In re KEMEYS-TYNTE.
KEMEYS-TYNTE *v.* KEMEYS-TYNTE.

dependence upon the subsequent continuance or discontinuance of working them, either by the husband in his lifetime, or by those claiming under him since his death. They thought too that her right of dower of such mines, &c., could not be in any respect affected by leases made by the husband during the coverture"—that is, her right was exactly the same as if no lease had been granted by him during coverture; "but if any of the existing leases for years" (and no distinction was made as to whether the mines were open or not) "were made by the husband before marriage, then the endowment (if made of the mines) must be of the reversions and of the rents reserved by such leases as incident to the reversions, in which case they thought the widow would be bound, so long as the demises continued, to take her share of the renders, whether pecuniary or otherwise, according to the terms of the respective reservations. They were also of opinion that the widow was not dowable of any of the mines or strata which had not been opened at all, whether in lease or not."

It came to this, that if at the time of the testator's death a mine was not opened at all, she was not entitled to dower. But if any leases had been made before her right to dower attached, although she was not dowable out of the mines, she was entitled to the rents and profits as incident to the reversions. So in this case, where mines have been let by the settlor before the will came into operation, the tenant for life under the will is entitled, in my opinion, to the rents and royalties as incident to the reversion of which he is tenant for life.

Solicitors for all parties: *Baker, Folder, & Upperton.*

D. P.

In re BYNG'S SETTLED ESTATES.

NORTH, J.

1892

April 7.

[1891 B. 5539.]

Settled Land—Land settled by Will—Trusts of Money declared by Deed for Purchase of Land to be settled on identical Limitations—Compound Settlement—Improvements—Application of Capital Money under Deed to Payment for Improvements on Estate settled by Will—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 21, 25, 26—*Settled Land Act*, 1890, *s.* 13.

Land was devised by will on limitations in strict settlement. The testator also by a deed declared that trustees, to whom he had transferred a money fund, should hold it on trust to lay it out in the purchase of land, which was to be settled on limitations identical with those of the will, except that two terms of years were interposed. The trusts of these two terms had become satisfied. The powers conferred by the two instruments were not precisely the same. The same persons were trustees of both the will and the deed.

Upon the application of the tenant for life in possession under both instruments:—

Held, that, although the limitations of the one instrument were not declared by reference to those of the other, but each set of limitations was stated independently, the principle of the decision in *In re Mundy's Settled Estates* (1) applied, and the will and the deed constituted one compound settlement, so that capital money arising under the deed could be applied in paying the cost of improvements executed upon land devised by the will.

ORIGINATING SUMMONS under the *Settled Land Acts*, 1882 to 1890, by *George Henry Charles*, Earl of *Strafford*, who was under the will, dated the 11th of September, 1844, of *George Byng*, the tenant for life of an estate called the *Wrotham* estate, and who was also tenant for life under a deed of settlement, dated the 12th of June, 1845, executed by *George Byng*, against *Alfred Walter Thynne*, *Richard Arkwright*, and the Honourable *Charles Cavendish George Byng*, who at the date of the summons were the trustees both of the will and the deed.

The summons asked for a declaration that the will and the deed created or were for the purposes of the above Acts one settlement.

The object of the application was, that, in case the Court

(1) [1891] 1 Ch. 399.

NORTH, J.

1892

In re BYNG'S SETTLED ESTATES.

should hold that the two instruments constituted one settlement, a subsequent application might be made to authorize the trustees to apply moneys in their hands as trustees of the deed in executing upon the *Wrotham* estate improvements such as are mentioned in sect. 25 of the *Settled Land Act*, 1882, and sect. 13 of the *Settled Land Act*, 1890.

By the will the testator devised (*inter alia*) the *Wrotham* estate unto Lord *John Thynne*, *Henry Tuffnell*, and *S. C. Whitbread*, and their heirs, to the use of the testator's wife, *Harriet Byng*, during her life; with remainder to the use of his brother *John*, Lord *Strafford*, and his assigns, during his life; with remainder to the use of *George Stevens Byng* (the eldest son of *John*, Lord *Strafford*), and his assigns, during his life; with remainder to the use of *George Henry Charles Byng* (the present Applicant), the eldest son of *George Stevens Byng*, and his assigns, during his life; with remainder to the use of his sons successively in tail male; with remainder to the use of *Henry William John Byng*, the second son of *G. S. Byng*, and his assigns, during his life; with remainder to the use of his sons successively in tail male; with remainders over in strict settlement, the ultimate remainder being to the use of the testator's own right heirs. There was a devise of the estate to trustees, in trust to preserve contingent remainders. There was a power for every tenant for life in possession of the devised estates who should have attained the age of twenty-one years, and also for the trustees, during the minority or respective minorities of any person or persons who by virtue of any of the limitations should be entitled by purchase to any estate of freehold or inheritance in possession of and in the estates, to grant leases of all or any parts of the estates for any term of years absolutely not exceeding twenty-one years, to take effect in possession.

The will did not make the tenants for life unimpeachable for waste.

By a deed of settlement dated the 12th of June, 1845, the testator declared the trusts of a sum of £300,000 Consols, which he had transferred to the three persons whom he had appointed trustees of his will. The Consols were to be held upon trust to sell the same, or any part or parts thereof, from time to time until

the whole should have been sold, and to invest the moneys to arise by such sale or sales, or any part or parts thereof, from time to time, in the purchase of land in fee simple in possession, and to settle the land so to be purchased to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements hereinafter declared and contained, viz., to the use of *George Byng* (the settlor), and his assigns, during his life, without impeachment of waste; with remainder to the use of trustees during his life, upon trust to preserve contingent remainders; with remainder to the use of the trustees, their executors, administrators, and assigns, for a term of 500 years, to commence from the decease of *George Byng*, upon the trusts thereinafter declared; with remainder after the expiration of the term, and in the meantime subject thereto, to the use of *Harriet Byng*, the wife of *George Byng*, and her assigns, during her life, and so that she or they should have no power to commit waste; with remainder in trust to preserve contingent remainders; with remainder to the use of *John*, Lord *Strafford*, and his assigns, during his life, and so that he or they should have no power to commit waste; with remainder to the use of trustees, upon trust to preserve contingent remainders; with remainder to the use of trustees, their executors, administrators, and assigns, for a term of ninety-nine years, to commence from the decease of the survivor of *George Byng*, *Harriet Byng*, and *John*, Lord *Strafford*, without impeachment of waste, upon the trusts thereinafter declared; with remainder to the use of *George Stevens Byng*, the eldest son of *John*, Lord *Strafford*, and his assigns, during his life, and so that he or they should have no power to commit waste; with remainder to the use of trustees, on trust to preserve contingent remainders; with remainder to the use of *George Henry Charles Byng* (the present Applicant), and his assigns, during his life, and so that he or they should have no power to commit waste; with remainder to the use of trustees, on trust to preserve contingent remainders; with remainders over in strict settlement, the limitations being identical with those contained in the will, except that after each life estate there was interposed a limitation to trustees, on trust to preserve contingent remainders, and that each tenant for life

NORTH, J. 1892 *In re* Byng's Settled Estates.

was expressly made impeachable for waste. Then followed a declaration of the trusts of the terms of 500 years and ninety-nine years respectively. A power of sale and exchange was given to the trustees, and it was agreed and declared that, if any of the lands so to be purchased or received in exchange should consist of or include any mines, whether opened or unopened, or should have been usually let on lease for a life or lives, or for years determinable on a life or lives, it should be lawful for the trustees to cause such provisions to be inserted in the settlements to be made thereof respectively as they should think proper for the working of the mines and for granting mining leases, and also for granting leases of the lands so usually let on lease, and also for determining, or empowering any person or persons to determine, what portion or portions of the profits of such mines, or of the rents, royalties, fines, or premiums to be received under or in consideration for such leases respectively, should be considered as income, and what proportion thereof should be considered as capital.

George Byng died on the 10th of January, 1847.

By an order made by Mr. Justice *North* on the 17th of February, 1888, the trustees of the will were appointed trustees for the purposes of the Acts of the settlement made by the will.

The trusts of the terms of 500 years and ninety-nine years respectively had long since been satisfied, and those terms had accordingly determined under provisoes for cesser contained in the deed.

On the 29th of October, 1886, the Applicant became tenant for life in possession under both the will and the settlement. A sum of about £17,000 was required for repairs and improvements upon the *Wrotham* estate. The trustees had in their hands, as trustees of the will, a sum of £2000, which they were advised was applicable, under sect. 33 of the *Settled Land Act*, 1882, as capital money arising under the Act, and they were willing that that sum should be applied in improvements on the *Wrotham* estate under sect. 26 of the Act. They had also as trustees of the deed a sum of £22,500 2¾ per cent. Consols standing in their names, which was liable to be laid out in the purchase of land, pursuant to the trusts of the deed. They were willing that the

required sum of £17,000 should be made up out of that sum, if the Court should be of opinion that the deed and the will constituted or created one settlement.

Howard Wright, for the tenant for life:—

The will and the deed constitute, within the meaning of sect. 2, sub-sect. 1 (1), of the *Settled Land Act*, 1882, one settlement for the purposes of the *Settled Land Acts*, and capital money arising under the deed can therefore be applied in paying the cost of improvements executed upon the land which is subject to the limitations of the will. The limitations contained in the deed and in the will, as they now subsist, are identical, and the principle of the decision of the Court of Appeal in *In re Mundy's Settled Estates* (2) applies. The precise point which now arises did not arise then, because the limitations of the will were declared by reference to the limitations of the previous deed; but the principle of the decision covers the present case.

Bryan Farrer, for the trustees:—

In re Mundy's Settled Estates is distinguishable from the present case. In that case it was necessary to refer to the deed in order to ascertain what the trusts and limitations of the will were. In an abstract of the title to land subject to the will the deed must have been set forth. In the present case each document contains its own limitations, though it so happens that they are now identical. But the two are entirely unconnected with each other. The settlement took effect at the time when it was executed. The two terms were then in existence, and their trusts were distinct from anything contained in the will. In *In re Lord Stamford's Settled Estates* (3) two estates

(1) Sect. 2, sub-sect. 1: "Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires."

(2) [1891] 1 Ch. 399.

(3) 43 Ch. D. 84.

NORTH, J.
1892
In re BYNG'S SETTLED ESTATES.

were devised by the same will. If the contention for the Applicant be well founded the result would be, that, if land subject to the limitations of the will were sold and the purchase-money laid out in the purchase of other land, the land so purchased would become subject to the provisions of the will, plus those of the deed. There is an important difference between the deed and the will with regard to mines. The deed contains a special provision for the apportionment between capital and income of the profits, rents, &c., of mines. As regards the will, sect. 11 of the *Settled Land Act*, 1882, would regulate the apportionment.

Under the will the trustees have no power of sale; under the deed they have a power of sale. If the two instruments form one settlement, the trustees of the deed would, by virtue of sect. 16, sub-sect. 1, of the *Settled Land Act*, 1890, become trustees for the purposes of the Acts of the compound settlement, and would have to receive the purchase-money of any land subject to the will which was sold.

It is submitted that the true test whether two instruments constitute one settlement is this: In making out a title to the land would it be necessary to put both documents in the abstract? In *In re Mundy's Settled Estates* (1) that must have been done; in the present case it need not.

The point which now arises was not raised in *In re Mundy's Settled Estates*, and it was expressly reserved by Lord Justice *Lindley*.

NORTH, J.:—

In my opinion the will and the deed really constitute for the present purpose one settlement. By the will certain real estate was settled upon a series of limitations, so as to make it, strictly speaking, a settled estate. Some of these limitations are still subsisting, and the present Applicant is now entitled to the estate as tenant for life in possession. Under the deed he is tenant for life in exactly the same way, looking at the limitations as a whole. Under the deed a sum of £300,000 was to be laid out in the purchase of land, which was to be settled upon limitations corresponding more or less exactly with the limitations of the

(1) [1891] 1 Ch. 399.

will. There were some slight differences by reason of the interposition in the deed of some terms of years; but the trusts of those terms have now come to an end, and, as regards the present tenant for life and the persons entitled in remainder after him, the limitations of the will and of the deed are exactly the same. If the estates are not disentailed and the limitations are allowed to run their natural course, the estates subject to both instruments will ultimately go to the right heirs of the settlor. In both instruments the tenant for life is in fact impeachable for waste. I distinguish between the limitations and the powers contained in the two instruments. The powers are not exactly the same. The power of leasing is practically superseded by the power conferred by sect. 6 of the *Settled Land Act*, 1882. The provisions of the deed with regard to the apportionment between capital and income of receipts from mines differ from those of the will. Under the deed the apportionment is left to the discretion of the trustees, or of persons who are to be nominated by them. In the case of the will the apportionment will be regulated by sect. 11 of the *Settled Land Act*, 1882. Putting this difference aside for the moment, it seems to me that, for the purpose of laying out capital money in improvements, the limitations of the two instruments taken together do form what I may call one compound settlement. I think this follows from the decision of the Court of Appeal in *In re Mundy's Settled Estates* (1). In that case I thought the point a very open one, and at my suggestion it was taken to the Court of Appeal. In that case certain estates were settled by a deed, and other estates were settled by a will; but the limitations of the will were declared by reference to those of the deed. It was necessary, therefore, to look at the deed for the purpose of ascertaining what the limitations of the will were. But that did not make the deed a part of the title which would have to be deduced upon a sale of land comprised in the will; it was only necessary to look at the deed for the purpose of writing out in full the limitations of the will. I may liken it to a case in which powers had been conferred by a deed by reference to the powers conferred by an Act of Parliament; in such a case it would

(1) [1891] 1 Ch. 399.

NORTH, J
1892
In re BYNG'S SETTLED ESTATES.

not be correct to say that the Act was incorporated with the deed, although it would be necessary to refer to a print of the Act for the purpose of ascertaining what the powers given by the deed were. In *In re Mundy's Settled Estates* (1), Lord Justice *Lindley* considered that the deed and the will together constituted one settlement. It is true that he went on to say this (2): "If we look at the object of the Act, it seems to me that we are perfectly safe in going thus far—that where you have two instruments, one referring to another, as you have here, and one directing money to be laid out in land to be settled to the same uses as the other, the money is capital money for both purposes, or for either. How the case would be if we had two distinct instruments with distinct limitations under them, we have not to consider. We have a case in which the will refers to a settlement in which the limitations are the same, and it appears to me that there is no difficulty in this case when you bear that in mind, and construe this Act of Parliament for the purpose of carrying out the plain and clear object which the Legislature had in contemplation." If the judgment of Lord Justice *Lindley* had been the only one, and no other judges had taken part in the decision, it would have been plain that the point which I have now to decide was left open, though even then it would have been perfectly legitimate for me to look at the reasons which Lord Justice *Lindley* gave for his decision; and I think those reasons assist me in coming to the conclusion at which I have arrived. But the other Lords Justices went much further than Lord Justice *Lindley* did. Lord Justice *Lopes* said (3): "The trusts of the fund in question and the settlement are identical. The devolution is also the same. It appears to me that this case is within sub-sect. 1 of sect. 2 and sect. 33 of the Act of 1882, and this conclusion is, to my mind, in accordance with the language of the Act, and also in accordance with its spirit, and I should be very sorry to be obliged to come to any other conclusion than that at which we have arrived." Lord Justice *Kay* pointed out that the deed and will were not identical for all purposes, and the distinction to which he referred must

(1) [1891] 1 Ch. 399. (2) [1891] 1 Ch. 409.
(3) [1891] 1 Ch. 410.

have been present to the minds of the other Lords Justices; but still they did not affect the conclusion at which they arrived. Lord Justice *Kay* said (1): "There was this difference between the two instruments, that, although one of the trustees of the settlement of 1872 was also a trustee of the will, the others were different; and, of course, when the settlement under the will came to be made it could not be made in the names of the trustees of the settlement without their consent; so that the settlement would be made in the names of the trustees of the will, and thus it seems to me possible that the power of selling the lands which ought to be bought under the trusts of the will might be vested in persons who were different from those who had power to sell the lands contained in the settlement. So that, in one sense, and in the strictest possible sense of the word, there were two settlements, one by the deed of 1872, and the other by the will, which was a separate settlement settling other lands, and moneys to be invested in land, on trusts which were declared by reference to the settlement of 1872. But the trusts were identical; there was the same tenant for life of the two, and, if the money dealt with by the will had been invested in lands, he would have been tenant for life of those lands and, after his life estate had determined, all those lands, both under the will and under the settlement, would go by the same series of limitations, which are explicitly set forth in the settlement. Thus, the limitations being the same, although in the strictest sense of the word they are two settlements, are they two separate settlements for the purposes of and the intention of this Act of Parliament? No doubt a slight ambiguity arises on the terms of the section which has been referred to; but, assuming that there is an ambiguity, what is the proper mode of construing an Act of Parliament of this kind? The proper mode of construing an Act of Parliament seems to me to be, to ascertain what the scope and intention of the Act of Parliament is. Is it within the scope and purpose of the Act of Parliament that, where land and money are settled on identically the same trusts, that money should be applicable to the improvement of that land? It seems to me that unless it were so there would be a clear *casus omissus*

(1) [1891] 1 Ch. 410.

NORTH, J. 1892 *In re* Byng's Settled Estates.

in the Act of Parliament, and I do not think that any of this language can be read so hypercritically as to oblige us to come to any other conclusion." In my opinion, though there were differences between the limitations of the will and the deed in the present case, there is nothing to prevent my saying that the two instruments constitute one settlement for the purpose of the question which is now before me—viz., whether capital money arising under the deed can be applied in paying the cost of improvements executed upon land comprised in the will to which capital money arising under the will would clearly be applicable. I can see no difficulty in this. I am not now considering the question whether capital money arising under the will could be applied in purchasing land with mines under it to be settled on to the limitations of the deed. For the present purpose the limitations of the two instruments appear to me to be identical. I express my opinion upon the point at once for the guidance of the parties. But before I can make any order it will be necessary that I should be satisfied that the proposed improvements are such as would be proper under both instruments. If the proposed improvements could not be made under one of them, I could not sanction the application of money arising under that instrument to such improvements executed upon land comprised in the other. That difficulty does not arise at present, but I cannot make any order until I know exactly the nature of the proposed improvements. The hearing of the summons must stand over, with liberty to amend.

Solicitors: *Farrer & Co.*

W. L. C.

NORTH, J.
1892
April 2.

In re CLIFF'S TRUSTS.

[1892 C. 616.]

Will—Construction—Will in Foreign Language—English Translation admitted to Probate—Translation alleged to be inaccurate—Right of Court to look at Original Will.

An Englishman, who had resided in *France*, died there, having made a will in the French language, which was registered in *France* and was retained there. Probate of an English translation was afterwards granted by the Probate Division of the High Court to the executor appointed by the will. The translation was certified by an English notary public to be a true and faithful translation of a copy (in French) of the original will, which was certified by a notary public in *France* to be a correct copy. The English translation and the certified French copy were both annexed to the certificate of the English notary, and were both deposited in the Probate Registry. A question upon the construction of the will being raised in the Chancery Division, and it being alleged that the English translation was inaccurate:—

Held, that, none of the parties insisting upon an application being made to the Probate Division to correct the English translation, the Court was entitled to look at the original French as well as at the English translation:

But *held*, that the Court could not construe the will without the assistance of French lawyers, nor until the testator's domicil had been ascertained.

The report of *L'Fit* v. *L'Batt* (1) corrected.

PETITION and originating summons raising questions upon the construction of the will of *Edwin Cliff*, who died on the 8th of July, 1874, in *France*, where he had been residing. The will was written in the French language. On the 28th of January, 1876, administration with the will annexed was granted by the English Court of Probate to *Charles Sawbridge*, as attorney of the executor, who was a Frenchman residing in *France*, until he should duly apply for and obtain probate to be granted to him. When this administration was granted a copy in French of the will (certified by a French notary public to be a correct copy) was deposited, together with an English translation, both documents being accompanied by and annexed to a certificate of a notary public in *London*, which stated that the translation was a

(1) 1 P. Wms. 526.

NORTH, J.
1892
In re CLIFF'S TRUSTS.

true and faithful one, and the administration was granted with the English translation. The original will had been registered in *France* and remained there. On the 10th of May, 1876, probate was granted to the executor.

The question raised on the present occasion was, whether a share of the residuary real and personal estate of the testator, devised and bequeathed by his will in trust for his sister, *Celina Edwards*, for her life, was now divisible between all her children who were living at the death of the testator, or only between such of them as survived the tenant for life.

The children of *Celina Edwards* who survived their mother claimed the whole fund.

Their claim was opposed by two mortgagees of two children respectively of *Celina Edwards*, who had survived the testator but had died before their mother. It was alleged on their behalf that the English translation was inaccurate.

H. Terrell, for the Petitioner, one of the surviving children of *Celina Edwards*, who was also the Plaintiff in the summons:—

For the purpose of construing the will the Court can look only at the document which was admitted to probate—viz., the English translation: *L'Fit* v. *L'Batt* (1); *Bernal* v. *Bernal* (2). In the former case it appears from the report that the original will in the French language was proved. The facts of the latter case are, in substance, identical with those of the present case.

[NORTH, J.:—The question is whether I ought to give the parties an opportunity of applying to the Probate Division to have the English translation of the will corrected. In *Bernal* v. *Bernal* the original Spanish will had been destroyed by fire, so that it was impossible to correct the translation.]

B. B. Rogers, for one of the mortgagees:—

The report of *L'Fit* v. *L'Batt* is not accurate; the facts were really like those of the present case. An officer from the Probate Registry is in attendance with the documents which were deposited in the registry on the proof of the will in *L'Fit* v. *L'Batt*.

(1) 1 P. Wms. 526. (2) 3 My. & Cr. 559, 561, 563, n.

[The documents were handed to the learned Judge.

NORTH, J. (after looking at them):—It appears that the original will was not proved in that case. Only an English translation was proved. But a copy of the will in French was also deposited.]

B. B. Rogers:—And yet according to the report, Sir *J. Jekyll*, M.R., said, "Nothing but the original is part of the probate," and he held that the Court was entitled to look at the original. That applies exactly to the present case. The only thing which can be proved is the will of the testator, though the probate copy is issued in the English form. But the Court had before it a copy of the will in French. At any rate, the Court has power to order the petition to stand over to enable an application to be made to the Probate Division to correct the English translation.

Ingpen, for the other mortgagee.

Marcy, for trustees.

W. M. Cann, for other Respondents.

Terrell, in reply:—

It is possible that the report of *L'Fit* v. *L'Batt* (1) is in substance accurate, for the actual probate which was delivered out may have contained both a copy of the original will and the English translation. In *Bernal* v. *Bernal* (2), Lord *Cottenham* said that "the probate copy must be conclusively considered as the document upon which the Court was to act."

NORTH, J.:—

Having regard to the real facts of *L'Fit* v. *L'Batt*, as I have ascertained them from the documents in the Probate Registry, I think I am bound to look at the French will as well as at the English translation. It may be that, if any of the parties had insisted upon it, I could not have looked at the French document until the English translation had been brought before the Probate Division for the purpose of its being corrected. But no one

(1) 1 P. Wms. 526. (2) 3 My. & Cr. 561, 563, n.

NORTH, J. 1892 *In re* CLIFF'S TRUSTS.

has insisted upon this being done, and that being so, I am prepared to look at the French document just as if it, as well as the English translation, had formed part of the probate. But the will being a French legal document containing technical terms, I cannot take upon myself to say what the meaning of it is without the assistance of French lawyers. Moreover, I do not yet know what the domicil of the testator was, and this must have an important bearing upon the construction of his will. The English translation may have to be prepared on a different footing, according as the domicil was French or English. The petition must stand over generally, with liberty to apply to restore it.

Terrell:—We will accept a copy of the French copy which is in the Probate Registry as a correct copy of the will.

Solicitors: *Charles Sawbridge & Son; Clayton, Sons, & Fargus; P. Collings & Co.; Tucker, Lake, & Lyon.*

W. L. C.

Distinguished. In re SANDBACH [1951] 1 Ch. 294

In re HOWARD'S SETTLED ESTATES.

STIRLING, J.

1892 Feb. 12, 13, 18.

Settled Land—Tenant for Life—Improvements, Money borrowed for—Security for Loan—Terminable Rent-charges—Purchase of by Trustee before 1887—*Redemption—Sale of improved part of Estate—Improvement of Land Act*, 1864 (27 & 28 *Vict. c.* 114), *s.* 60 [*Revised Ed. Statutes, vol. xiv. p.* 995]—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-ss.* 2, 3; *ss.* 25 *and* 26—*Settled Land Acts* (*Amendment*) *Act*, 1887 (50 & 51 *Vict. c.* 30), *ss.* 1, 2, 3.

The tenant for life of a settled estate, acting under the powers of the *Improvement of Land Act*, 1864, between the years 1881 and 1885 borrowed money for improvements on the estate upon the security of terminable rent-charges executed to the lenders by the Commissioners, in the form prescribed by the Act of 1864, which contains no proviso for redemption. The improvements were of the character authorized by the *Settled Land Act*, 1882. The trustee of the settlement bought up these rent-charges between 1883 and 1885, out of capital moneys in his hands for investment under the settlement. The portions of the settled estate on which the improvements had been effected were sold in 1888, and under the powers of the *Settled Land Act*, 1882, the terminable rent-charges were shifted on to other portions of the settled estate.

The *Settled Land Acts* (*Amendment*) *Act*, 1887, provides, in effect (*inter alia*) that, where any improvements, of a kind authorized by the *Settled Land Act*, 1882, have been or may be made either before or after the passing of the Act, and rent-charges have been or may be created under any Act to pay off loans for such improvements, any capital moneys expended in redeeming, or providing for the payment of, such rent-charges shall be deemed to be applied in payment for improvements authorized by the Act of 1882:—

Held, (1.) That the buying up of the rent-charges by the trustee was an investment of capital money under sect. 60 of the Act of 1864, and not an expenditure of capital money in redeeming or otherwise providing for the payment thereof within sect. 1 of the Act of 1887.

(2.) That the Act of 1887 was not retrospective, so as to entitle the tenant for life to be recouped out of capital moneys the instalments of the rent-charges paid before the Act came into operation.

(3.) But that, as regards instalments falling due after the passing of that Act and after the question had been raised by the tenant for life, he was entitled to have provision made for them out of capital moneys subject to the trusts of the settlements, notwithstanding that the improved portions of the settled estate had been sold; and *held*, accordingly, that such provision must be made in the present case as regards the instalments accrued and to accrue after the 25th of March, 1889, when the question first arose.

ADJOURNED SUMMONS.

This was a summons by Mr. *Philip John Canning Howard*, the

STIRLING, J. 1892 *In re* HOWARD'S SETTLED ESTATES.

tenant for life of the *Corby* and *Coniscliffe* estates, in the counties of *Cumberland* and *Durham*, asking (1.) that it might be declared, having regard to the provisions of the *Settled Land Act* of 1887, and upon the true construction thereof, that all capital moneys applied by *Henry Stourton*, the surviving trustee of the settlement, in the purchase of the rent-charges specified in the schedule to the summons, "ought to be, and shall be deemed to have been applied in payment for improvements authorized by the *Settled Land Act*, 1882. And that, accordingly, the Applicant, or other the person for the time being beneficially entitled to possession of the above-mentioned settled estates, was, and is, under no liability to make any repayments to the said *Henry Stourton* in respect of the said rent-charges or any of them. And that all such rent-charges ought to, and shall, be deemed to have merged in or for the benefit of the inheritance of the estate charged therewith"; (2.) that the trustee "may be ordered to pay and transfer to the Applicant all moneys and investments now in his hands or under his control, and representing any part of the repayments heretofore made by the Applicant to the said *Henry Stourton* in respect of the said rent-charges, or any of them"; and, (3.) in case the Judge should be of opinion that the capital moneys so applied as aforesaid cannot be deemed to have been applied in payment for such improvements as aforesaid, then that "proper directions may be given for the redemption, or making other provision, of, or for, the said rent-charges, by the said *Henry Stourton*, by means of further capital moneys now in his hands and comprised in the settlement."

The application was made under these circumstances:—

At various times between the years 1881 and 1885 the Applicant had borrowed, from the *Lands Improvement Company*, six different sums of money, under the powers conferred by the *Improvement of Land Act*, 1864, for the purpose of executing certain improvements on the estate, which the learned Judge assumed for the purpose of his decision to have been in themselves improvements within the meaning of sect. 25 of the *Settled Land Act*, 1882.

In order to secure the repayment of these sums, and the interest thereon, the Inclosure Commissioners, under the powers of

the 49th and following sections of the Act of 1864, executed six rent-charges upon the inheritance of the settled lands, payable by half-yearly instalments, for the term of twenty-five years, the dates of which rent-charges ranged from the 9th of December, 1884, to the 4th of June, 1885. These rent-charges were all in the form prescribed by the Act, which does not contain any proviso or contract for redemption.

Sect. 60 of the *Improvement of Land Act*, 1864, provides that "all trustees, directors, and other persons who may be directed or authorized to invest any money on real security, shall (unless the contrary be provided by the instrument directing or authorizing such investment) have power, at their discretion, to invest money in such charges, or on mortgages thereof."

Under the powers conferred by this section, at various times in 1883 and 1885, Mr. *Henry Stourton*, the trustee of the settlement, out of trust moneys in his hands for investment in real estate, bought up these rent-charges, which thus became vested in him.

After the purchase of these rent-charges by Mr. *Stourton*, the Applicant paid the half-yearly instalments payable thereunder out of his own moneys, and Mr. *Stourton* repaid him as tenant for life under the settlement the proportion of the instalments which represented interest, but retained and invested in his own name, as trustee of the settlement, the proportion of the instalments which represented capital.

The *Settled Land Acts* (*Amendment*) *Act*, 1887, enacts, so far as material, as follows: Sect. 1. "Where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rent-charge . . . . has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882." Sect. 2. "Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be

STIRLING, J. 1892 *In re* HOWARD'S SETTLED ESTATES.

deemed to be an improvement within the meaning of sect. 28 of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement." Sect. 3: "This Act shall be construed as one with the *Settled Land Act*, 1882, and the *Settled Land Act*, 1884."

In the year 1888 certain portions of the settled estate, comprising those parts of it on which the improvements had been made, were sold; and with a view to a sale the rent-charges were, under the powers of the *Settled Land Act*, shifted from the portions of the estate which were sold to other portions of the same estate.

The question which led to the present application was first raised on the 25th of March, 1889, and the tenant for life had paid the rent-charges down to that date.

Carson, for the summons:—

The redemptions effected by the trustees in 1883 and 1885, *i.e.* between the Acts of 1882 and 1887, are within the provisions of sect. 1 of the Act of 1887, which is retrospective in its operation.

The first Act which enabled charges to be effected for improvements was the *Improvement of Land Act*, 1864 (27 & 28 Vict. c. 114). By sect. 8, the tenant for life is a "landowner" who may borrow money for improvements; and under sects. 49 and 51, the Commissioners are to execute rent-charges to secure the loan. By sect. 60, trustees are empowered to invest in such rent-charges; and by sect. 65, they may be assigned by the grantee.

By sect. 66, tenants for life are bound to keep down the rent-charges; and by sect. 72, the improvements are to be kept in repair by the persons who are bound to make the payments in respect of the rent-charges. Under that Act, therefore, the tenant for life had to do three things: (1.) to pay the interest on the loan; (2.) to repay the proportion of capital; and (3.) to keep the improvements in repair.

By the Act of 1882, the same thing can be done, but in rather a different way. By sect. 21, sub-sect. 3, capital money arising under the Act may be applied in payment for any improvement authorized by the Act. Sect. 25 contains a description of the

improvements authorized by the Act, and all the improvements effected in this case are within that section. Sect. 28 imposes upon the tenant for life and his successors the obligation of maintaining and insuring the improvements. Comparing the machinery of the two Acts it would seem that, whereas under the Act of 1864 the tenant for life was under three obligations, under the Act of 1882 he is under two only. He is no longer liable to repay the *corpus*.

Shortly after the passing of the Act of 1882, an attempt was made to give it a retrospective operation, and the case of *In re Knatchbull's Settled Estate* (1) was the direct consequence of that attempt. In that case it was held that terminable improvement rent-charges created under the Act of 1864 or similar Acts were not incumbrances payable under sect. 21, sub-sect. 2, out of capital money. The effect of Mr. Justice *Pearson's* decision was that sects. 21, 25 and 26 were not to be treated as having a retrospective operation. That decision was affirmed by the Court of Appeal in *In re Knatchbull's Settled Estate* (2), the result being that any charges created before that decision, remained as they were and could not be redeemed or discharged. That was considered as a blot upon the Act of 1882, and in order to get rid of it, the *Settled Land Act* of 1887 was passed. After that an attempt was made to extend the operation of the Act to a case where the trustees had not taken over the charge, but desired to expend capital money in payment of instalments partly representing interest; but it was held, in *In re Lord Sudeley's Settled Estates* (3), that that could not be done. That, however, was not a case of redemption, like the present, and the decision was somewhat adversely criticised by the Court of Appeal in *In re Lord Egmont's Settled Estates* (4), which was a case of redemption. The Court in that case said in effect, that that might be done which has in fact been done by the trustees here. The Act of 1887 must be taken to have operated as from the passing of the Act of 1882, with which, by sect. 3, it is to be construed as one. The clause providing for relief against forfeiture, in the *Conveyancing Act*, 1881, sect. 14, has been held to be retrospective

(1) 27 Ch. D. 349.
(2) 29 Ch. D. 588.
(3) 37 Ch. D. 123.
(4) 45 Ch. D. 395.

STIRLING, J. 1892 *In re* HOWARD'S SETTLED ESTATES.

in its operation: *Quilter* v. *Mapleson* (1). I submit that the Act of 1887 was intended to have a retrospective effect. It "alters the rights of the parties under an existing contract": *Quilter* v. *Mapleson* (2). In that case a retrospective operation was given to the *Conveyancing Act* of 1881, and it was held that sect. 14, sub-s. 2, thereof applied to breaches of covenants committed before the Act.

On the third paragraph of the summons we are clearly entitled to succeed. There has been no acquiescence such as to deprive us of our rights under the Act. Down to the passing of the Act of 1887 we were bound by *In re Knatchbull's Settled Estate* (3), and after the Act of 1887 difficulty was created by the case of *In re Lord Sudeley's Settled Estates* (4). At all events, the Applicant is entitled to relief under the third paragraph of the summons.

R. J. Parker, for the surviving trustee of the settlement:—

The contention that the Act of 1887 is retrospective, is entirely based on inference. There is no provision or language in the Act which amounts to an enactment that the Act shall have a retrospective operation. The statement in the 3rd section that it is to be construed as one with the Act of 1882, is a common form, and cannot be sufficient to carry back the operation of the Act.

What the trustee did was to "invest," under the powers of sect. 60 of the Act of 1864, trust moneys in his hands in the purchase of these rent-charges; and after he had bought them, the rent-charges still remained on foot, and the tenant for life still remained under his statutory obligation to pay them. There was nothing in the transaction in the nature of redemption, nor shewing any intention to redeem; and there is nothing in the form of the charges which makes them redeemable. The trustees held them as trustees, with the obligation of compelling the tenant for life to keep up the payments: *In re Knatchbull's Settled Estate* (5).

The Act of 1882 did not alter the position of the tenant for

(1) 9 Q. B. D. 672.
(2) Ibid. 672, 674.
(3) 29 Ch. D. 588.
(4) 37 Ch. D. 123.
(5) 29 Ch. D. 588, 595.

life or the trustee, with reference to these rent-charges, and the instalments which became due after the passing of the Act, are in the same position as those which had then already been paid.

But there is this peculiarity in the present case: those portions of the settled estate upon which the improvements were effected have been sold, and the rent-charges have been shifted on to other portions of the settled estates.

The improved lands are no longer comprised in the settlement, and there are no longer improvements which the tenant for life is under an obligation to maintain under sect. 28 of the *Settled Land Act*, 1882: *In re Hotchkin's Settled Estates* (1). Consequently, the improvements are not improvements in payment for which capital money is applicable under the Act of 1887.

Carson, in reply:—

The value of the portion of the estate sold was increased by the money spent upon the improvements, and the remaindermen will get the benefit of that increased value. Those improvements are now represented by the rent-charges. What the trustee has done here was, in *In re Knatchbull's Settled Estate* (2), called a redemption.

1892. Feb. 18. STIRLING, J. (stated the facts and continued):—

Now, the *Settled Land Act* of 1882, by sect. 21, sub-sect. 2, provides that capital money arising under the Act may be applied "in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate, the subject of the settlement;" and sub-sect. 3 says: "In payment for any improvement authorized by this Act." Then sect. 25 describes the nature of the improvements; sect. 26 regulates the mode in which the capital money is to be applied for the purpose of the improvement; and sect. 28 provides that, "The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain

(1) 35 Ch. D. 41. (2) 29 Ch. D. 588.

STIRLING, J. 1892 *In re* HOWARD'S SETTLED ESTATES.

and repair, at his own expense, every improvement executed under the foregoing provisions of this Act," and by sect. 22, sub-sect. 2, the application of the capital money for the purposes of the Act is to be made according to the direction of the tenant for life.

Under that Act the question arose in the case of *In re Knatchbull's Settled Estate* (1), whether charges created under the *Improvement of Land Act*, passed in 1864, could be paid out of capital moneys under the *Settled Land Act* of 1882; and it was held that they could not. The reason for the decision is very shortly given in a few words in the judgment of Lord Justice *Fry*, which I shall read (2): "The money in question was borrowed under the provisions of the *Improvement of Land Act*, 1864, and under the provisions of that Act a rent-charge was created, and under sect. 66 of that Act the present tenant for life, as between himself and the persons in remainder, was under a statutory obligation to pay the yearly or other periodical payments of that charge. He seeks to discharge himself from that by an operation under the *Settled Land Act*, 1882. He has contended in effect that the provisions which I have referred to in the Act of 1864 are repealed by the Act of 1882. He relies upon the 2nd sub-section of the 21st section of that Act, which enables the money arising from the sale of land to be applied in discharge, purchase, or redemption of incumbrances affecting the inheritance. It appears to me in the present case that he cannot apply it in discharge or redemption. The incumbrance does not provide for any other method of discharge than by the annual payments. Therefore there is no method of discharging it by the payment of a capital sum. There is no power of redeeming it by the payment of a capital sum. The only possible power, therefore, would be to apply capital sums in the purchase of the incumbrance. That may be within the power given by sub-sect. 2, and as at present advised I think that it is. But the result would be a purchase which would not extinguish the liability of the tenant for life under sect. 66 of the Act of 1864. Therefore the trustees in my judgment might purchase this incumbrance if the persons entitled to it were

(1) 27 Ch. D. 349; 29 Ch. D. 588. (2) 29 Ch. D. 594.

willing to sell it; but they would hold it as trustees, and they would be under the obligation to compel the tenant for life to make the payments which, under sect. 66, he was bound to make."

That being the state of the law, the *Settled Land Act* of 1887 is passed; and sect. 1 is: "Where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882." Sect. 2 is that, "Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of sect. 28 of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement." Then, by the last clause, the Act is to be construed as one with the *Settled Land Act* of 1882, and the *Settled Land Act* of 1884.

Now, the question which I have to decide is, first of all, whether what was done prior to the passing of the Act of 1887 can be undone, so to speak; in other words, whether I can give effect to the application contained in the first two paragraphs of the summons; and, secondly, whether as regards all instalments of the rent-charge which have not been paid, a prospective order can be made.

The Act takes a peculiar form. It does not say that these shall be deemed to be incumbrances within the meaning of sect. 21, sub-sect. 2, of the Act of 1882. It says that "any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882." The object of that seems to have been to introduce the provisions of sect. 28 of the *Settled Land Act*, which is done

STIRLING, J. 1892 *In re* HOWARD'S SETTLED ESTATES.

by sect. 2 of the Act of 1887, and to impose upon the tenant for life the duty of keeping up and maintaining the improvements which had been effected, not under the *Settled Land Act*, but under the Act of 1864.

Now, does this section apply to what has been done in the present case? Between the years 1882 and 1887, the rent-charges, as I have already said, were transferred to the trustee of the settlement, who paid the consideration money, no doubt, out of capital money within the meaning of the Act of 1882. But did that constitute an expenditure of capital money in "redeeming" the rent-charge "or otherwise providing for the payment thereof." It was not an expenditure in "redeeming" the rent-charge, because it was an expenditure of capital money by way of investment under the 60th clause of the Act of 1864, and the rent-charge remained on foot, and remained payable by the tenant for life in accordance with the terms of the Act. The only difference introduced was that payment was now made to the trustee of the settlement, and not to the persons in whose favour the rent-charges were originally created. Then, was it an expenditure of money "in otherwise providing for the payment of the rent-charges"? The payment still remained to be made and was made by the tenant for life under the provisions of the Act of 1864, and it seems to me, therefore, that the application, so far as it relates to past transactions, is not brought within the language of the Act.

Again, can I make an order directing the trustee to recoup to the tenant for life out of capital money the payments made by him between 1882 and 1887? That is not providing for the payment of those instalments of the rent-charges, for they have already been paid by the tenant for life. I do not think, therefore, that such an order falls within the terms of the Act. That, in my opinion, disposes of the case, but I wish to add that I am not satisfied that sect. 1 of the Act was meant to be retrospective so as to bring within its operation payments made before the passing of the Act. It no doubt is clearly meant to apply to improvements made either before or after the passing of the Act of 1887. It clearly applies also to rent-charges created both before and after the passing of the Act. But when we come to

the provisions dealing with the application of the moneys the language is no longer distinct and clear, as it ought to be, in order that the enactment may have a retrospective effect. In the first part of sect. 1 of the Act it is provided that, "Where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created." But then it goes on: "Any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied"—not to be or to have been, as one would have expected if the object of the Legislature was to make the section retrospective.

I think, therefore, that the application contained in the first two paragraphs of the summons does not fall within the powers conferred by the Act of 1887.

Then arises the question whether I can direct that provision should be made for the payment of the rent-charge so far as it remains unpaid from the time when the Act passed.

Now, it is settled by the decisions in *In re Lord Sudeley's Settled Estates* (1), and *In re Lord Egmont's Settled Estates* (2), that such provision may be made where the rent-charge remains subsisting on a portion of the estate which has been improved; but Mr. *Parker* very properly called my attention to the fact that the portion of the settled estate which had been improved had been sold; and he referred me to the expressions of doubt that are contained in the judgment of the various members of the Court of Appeal in the case of *In re Hotchkin's Settled Estates* (3), whether under the Act of 1882 capital money could be applied in paying for improvements on lands which were no longer in settlement. Now, I have read carefully those judgments, and unquestionably there would be great doubt if we were simply dealing with the Act of 1882, whether that could be done. But we are dealing with the Act of 1887, and the proposed application seems to me to be within the language of the Act. An improvement has been effected, a rent-charge has

(1) 37 Ch. D. 123.
(2) 45 Ch. D. 395.
(3) 35 Ch. D. 41.

STIRLING, J. 1892 *In re* HOWARD'S SETTLED ESTATES.

been created, with the object of paying off moneys advanced for the purpose of defraying the expenses of such improvement; and that being so, any capital money expended in providing for the payment thereof is to be deemed to be applied in payment for an improvement authorized by the Act of 1882. I think that the proposed application falls within the language of the Act, and I can see no reason why, in justice, it should not in this respect be granted.

What has been done, as I have already said, is this: the rent-charges have been transferred to other portions of the estate, and the improved portion of the estate has been sold free from those rent-charges. I have no doubt that a good price was got, and that the persons entitled in remainder under the settlement have benefited by the improvements which have been made in this way, that an increased price has been got for the estate by reason of those improvements being effected.

I cannot see, therefore, that there is anything which ought to prevent the tenant for life applying successfully to have capital moneys expended in providing for the payment of these improvements in accordance with the Act of 1887.

Therefore, I think that on the 3rd clause of the summons an order ought to be made directing that the instalments of the rent-charge which have accrued due since the 25th of March, 1889, when the question first arose, and remain unpaid, should be provided for out of capital money.

Solicitors: *Few & Co.*

W. W. K.

In re ROBERTSON, SANDERSON & CO.'S APPLICATION.

STIRLING, J.

1892
April 8.

Trade-mark — Application for Registration — Notice of Opposition — Appeal referred to Court — Amendment of Notice of Opposition — Jurisdiction — Patents, Designs, and Trade Marks Acts, 1883-8, *s.* 69 — *Trade Marks Rules*, 1890, *rr.* 31, 54, 55 — *Rules of Supreme Court*, 1883, *Order* XXVIII., *r.* 12.

Where an opposed application for the registration of a trade-mark has been allowed by the Comptroller, and an appeal by the opponent against the decision has been referred by the Board of Trade to the Court, the function of the Court is limited by sect. 69, sub-sect. 4, of the *Patents, Designs, and Trade Marks Acts*, 1883-8, to hearing and determining the appeal, and the Court has no jurisdiction to allow an amendment of the opponent's notice of opposition.

ON the 21st of October, 1890, Messrs. *Robertson, Sanderson & Co.*, of *Leith*, whisky merchants, applied for the registration of a trade-mark, No. 151,288, in respect of Scotch whisky. The trade-mark, which was not claimed as having been in use before August, 1875, consisted of an elaborate oval label, representing a Highland scene, with a broad bar across it, on which were the words "*Robertson, Sanderson & Co., Leith. The Original Mountain Dew.*" The mark was advertised in the *Trade Marks Journal* on the 18th of February, 1891.

On the 11th of March, 1891, Messrs. *John Gillon & Co.*, also of *Leith*, and carrying on a similar business, gave notice of opposition to the registration, the ground alleged being as follows: "The words '*The Original*' before '*Mountain Dew*,' '*Mountain Dew*' having been instituted by our firm nearly fifty years ago, and used by us ever since. Registered 31st of March, 1886, No. 48,465." The last reference was intended to be to a mark No. 48,468, containing the words "*Real Mountain Dew Whiskey*," which had been registered by *Gillon & Co.* *Robertson, Sanderson & Co.* had previously registered another mark, No. 32,838, containing the words "*Celebrated Mountain Dew.*"

On the 10th of April, 1891, *Robertson, Sanderson & Co.* put in their counter-statement, in which they denied that *Gillon & Co.* had "instituted" the words "*Mountain Dew*," or used them for nearly fifty years. The case then proceeded in the Patent Office in the usual course, statutory declarations being filed on both sides. The evidence was entirely confined to the issue which of

STIRLING, J. 1892 *In re* ROBERTSON, SANDERSON & Co.'s APPLICATION.

the parties had been the first to use the phrase "*Mountain Dew*" in connection with whisky; but when the case came before the Registrar of Trade-marks, representing the Comptroller, on the 7th of July, 1891, Mr. *J. G. Dawson*, a member of the firm of *Gillon & Co.*, who appeared in person, tendered in evidence a declaration made by one *Peter Mackenzie* on the 2nd of July, and of which a copy had been sent to the Applicants' solicitors only the previous night, purporting to shew that a firm of *Young & Co.* had used the phrase earlier than either of the contending parties. Counsel for *Robertson, Sanderson & Co.* objected to this evidence being received, and the Registrar rejected it, on the ground that the notice of opposition was limited to user by the firm of *John Gillon & Co.*, and therefore that the declaration was irrelevant to the issue he had to decide. No application for leave to amend the notice of opposition, or for an adjournment, was made, and the evidence on the part of *Robertson, Sanderson & Co.* shewing that they had used the words "*Mountain Dew*" at least as far back as 1851, and that on the part of *Gillon & Co.* failing to prove user by them before 1852, the opposition was disallowed and the registration directed to proceed.

On the 14th of August, 1891, *Gillon & Co.* gave notice of appeal to the Board of Trade, accompanied by the necessary "case on appeal," and on the 7th of October the Board of Trade referred the appeal to the Court, with liberty to either party to adduce such evidence as might be advised.

On the 1st of March, 1892, *Gillon & Co.* gave notice of motion in the Chancery Division that the Court should hear and determine the appeal and refuse the registration, and on this motion affidavit evidence was filed on both sides, that of *Gillon & Co.* being directed to establishing prior user by *Young & Co.*, and setting out a letter of the 29th of June, 1891, from *Peter Mackenzie*, which stated that he had discovered that *Young & Co.* had used the term "*Mountain Dew*" as far back as 1832. This letter *Gillon & Co.* alleged to have been the first intimation received by them of the facts therein stated. The evidence of *Robertson, Sanderson & Co.* was addressed to the rival claims of *Gillon & Co.* and themselves, and denied the relevancy of the statements as to *Young & Co.*

STIRLING, J.

1892

In re ROBERTSON, SANDERSON & Co.'s APPLICATION.

On the 21st of March, 1892, *Gillon & Co.* gave a second notice of motion, by which they asked for leave to amend their notice of opposition by adding, as new grounds of objection, that "(*a*) the Applicants were not, nor were their predecessors in business, the original distillers or sellers of '*Mountain Dew*' whiskey; (*b*) the use of the words '*The Original*' as part of the trade-mark No. 151,288, is calculated to deceive."

The last-mentioned motion was now brought on.

Hastings, Q.C., and *John Cutler*, for the Applicants, *Gillon & Co.*:—

The procedure in an opposition case, so long as it is before the Comptroller, is regulated by rule 31 of the Trade Marks Rules, 1890, and by rule 54 he has power to allow amendments in documents such as notices of opposition. If the case is appealed to the Board of Trade, and the Board hear the appeal, the procedure is governed by rules 20–26. If the Board of Trade, under sect. 69 of the *Patents, Designs, and Trade Marks Acts*, 1883–8, refer the appeal to the Court, then the case is not provided for by the Trade Marks Rules, but the matter is left to the general jurisdiction of the Court, and Order XXVIII., rule 12, of the Rules of Court applies, by which any proceedings can be amended by the Court. It is immaterial that the litigation was initiated elsewhere; when the case gets before the Court, the general power of amending applies. The jurisdiction which thus exists should be exercised in this case; if not, and the mark is registered without the new objection being raised, the whole question will have to be gone into again on a motion to rectify under sect. 90 of the Acts, and that is undesirable: *In re Arbenz' Application* (1). The amendment should be allowed on such terms as the Court may think fit to impose as to costs and the like.

Sir *R. E. Webster*, A.G., and *Sebastian*, for *Robertson, Sanderson & Co.*:—

The Court has no jurisdiction to allow any amendment in the notice of opposition. While the case is before the Comptroller, he has power, as decided in *In re Moët's Trade-mark* (2), to allow

(1) 35 Ch. D. 248. (2) 7 Rep. Pat. Cas. 226.

STIRLING, J. 1892 *In re* ROBERTSON, SANDERSON & Co.'s APPLICATION.

amendments of the notice of opposition under sect. 69; but that power, at all events as regards amendments which set up new grounds of opposition, cannot be exercised after a period of three months from the advertisement of the application for registration; otherwise sect. 69 would be evaded by allowing what is in effect a new notice of opposition to be given after the three months. That period of three months is a time fixed by the Act, and not by the Rules, so that the Comptroller cannot enlarge it under rule 55. For the same reason, even if the Court has in any case power to allow amendments, it cannot exercise it by allowing such amendments as these to be made at so late a date. But in fact the Court would have no power even if there were no objection in point of time. The Comptroller has decided the case on such issues as were open to the parties, under rule 31, sub-rule 8, and is *functus officio*. The Board of Trade has referred the appeal to the Court and is *functus officio*. The power of the Court is limited by sect. 69, sub-sect. 4, to hearing and determining the appeal. If the Court has power to allow an amendment raising a new case to be made, the consequence is that the Court will become a Court of first instance for deciding a question not raised before the Comptroller, and on which no appeal has been referred to the Court by the Board of Trade, whereas the entire jurisdiction of the Court is to hear and determine an appeal, which has been so referred, from a decision of the Comptroller. As the case has stood up to the present, the issue is simply which of the parties used the words first, and, without amendment of the notice of opposition, the contest must be confined to this issue under rule 31, sub-rule 8, and the evidence authorized by the order of the Board of Trade must also be confined to this issue. To allow the amendment would be to shift the ground altogether. Even if the mark is registered, it will still be open to *Gillon & Co.* to move to expunge it, under sect. 90; but they will have to prove they are aggrieved by the registration, and it is to avoid this necessity that the present application is made.

Hastings, in reply:—

The jurisdiction of the Court to hear and determine, implies a power to do all that is necessary to enable the Court to hear and

determine. The fact that a motion to rectify is possible, is not a reason for not having the whole matter disposed of on the original application for registration: *In re Moët's Trade-mark* (1).

STIRLING, J.:—

The question which I have now to decide is whether in this case I am to give the Applicants leave to amend their notice of opposition to the registration of a trade-mark which Messrs. *Robertson, Sanderson & Co.* are now seeking to register. The matter arises in this way: Upon Messrs. *Robertson, Sanderson & Co.* making this application for registration of their trade-mark, which, I understand, contained the words "*The Original Mountain Dew*," the present Applicants, Messrs. *John Gillon & Co.*, gave notice of opposition, dated the 11th of March, 1891, and the grounds of opposition which are alleged are these: "The words '*The Original*' before '*Mountain Dew*,' '*Mountain Dew*' having been instituted by our firm nearly fifty years ago, and used by us ever since." Now, as a matter of construction, it seems to me that that notice of opposition is limited to the user by the firm of *John Gillon & Co.* of the words "*Mountain Dew.*" It appears that this matter came before the Registrar for decision on the 7th of July, 1891, and that very shortly before that the first information was obtained by the present Applicants, Messrs. *John Gillon & Co.*, through a letter dated the 29th of June, 1891, that other persons than Messrs. *John Gillon & Co.* had used the words "*Mountain Dew*," as far back as 1832. Thereupon the Applicants obtained a statutory declaration, with a view to its being used before the Registrar at the hearing of their opposition. The statutory declaration only reached the hands of Messrs. *Robertson, Sanderson & Co.* on the morning, as I understand, of the 7th of July, 1891, and when it was put before the Registrar it was objected to by the learned counsel who appeared for Messrs. *Robertson, Sanderson & Co.* and the Registrar rejected it. It appears to me that the learned Registrar was right in rejecting it. The rule with reference to oppositions is Rule 31 of the Trade Marks Rules, 1890, sub-s. 8, which provides that, "On the hearing of the case no opposition

(1) 7 Rep. Pat. Cas. 226.

STIRLING, J. 1892 *In re* ROBERTSON, SANDERSON & Co.'s APPLICATION.

shall be allowed in respect of any ground not stated in the notice of opposition." Therefore, as user by other firms than *John Gillon & Co.* was not referred to in the notice of opposition, it appears to me that the statutory declaration was inadmissible on that opposition.

Then this is to be borne in mind: the opposition was conducted by a member of the firm of *John Gillon & Co.* in person, and he was not a lawyer, and had no lawyer with him. The learned Registrar, according to the shorthand writer's notes which have been read to me by the Attorney-General, made a remark as to his having been willing to allow a substantive application before the hearing to be made with reference to the admission of this evidence.

Now, it appears to me that possibly—indeed very probably—that intimation might not convey to the mind of the partner who was conducting the case, that it was his duty to make an application either for leave to amend his notice of opposition, or that the case might stand over. I also observe this, that from the statements made in the letter of the 29th of June, 1891, it does appear to me there is a case to be inquired into; and although the application to amend the notice of opposition comes late, yet it is one which would seem to me *primâ facie* to be deserving of consideration. I say no more with reference to that. The question arises whether I have any right to grant leave to amend the notice of opposition. The way in which the matter comes before me is this: The Registrar having decided against the opposition, the opponents, Messrs. *John Gillon & Co.*, gave notice of appeal, and on the 7th of October, 1891, the solicitor to the Board of Trade wrote to the solicitor of Messrs. *John Gillon & Co.* in these terms: "I am instructed to inform you that the Board of Trade have deemed it expedient to refer this appeal to the Court by virtue of the provisions of sub-sect. 4 of sect. 69 of the *Patents, Designs, and Trade Marks Acts*, 1883 and 1888, and have, pursuant to rule 23 of the Trade Marks Rules, 1890, directed the Appellants to make application by motion, summons, or otherwise, as they may be advised, to the Chancery Division of the High Court of Justice to hear and determine the said appeal, and that notice of such application be served upon the

1892

In re ROBERTSON, SANDERSON & Co.'s APPLICATION.

Comptroller-General of Patents, Designs, and Trade-marks, and upon Messrs. *Robertson, Sanderson & Co.*, of 11 and 12, *Quality Street, Leith, North Britain*, or upon Messrs. *Michael Abrahams, Sons & Co.*, 8, *Old Jewry, E.C.*, their solicitors, and that upon the hearing and determination of the said appeal the Appellants, the Comptroller, and the said Messrs. *Robertson, Sanderson & Co.*, be respectively at liberty to adduce such evidence as they respectively may be advised." Upon that, on the 1st of March, 1892, notice of motion is given on behalf of Messrs. *John Gillon & Co.*, "that the Court do hear and determine an appeal from the decision of the Comptroller-General of Patents, Designs, and Trade-marks, dated the 7th day of July, 1891, whereby the said Comptroller decided that the Mark No. 151,288 of the said *Robertson, Sanderson & Co.* was entitled to registration, and for an order that the said application by the said Messrs. *Robertson, Sanderson & Co.* for registration of the said Mark No. 151,288 be refused." Then, that notice having been given in the first instance on the 21st of March, 1892, a further notice of motion is given "that Messrs. *John Gillon & Co.*, of 5, *Mitchell Street, Leith, Scotland*, also of No. 62, *Mark Lane, London*, and 5, *Cooper's Row, Liverpool*, merchants, may have leave to amend their notice of opposition in the above matters, dated 11th day of March, 1891, by adding thereto the following:—(*a*) 'The Applicants were not, nor were their predecessors in business, the original distillers or sellers of "*Mountain Dew*" whiskey; (*b*) the use of the words "*The Original*" as part of the said trade-mark No. 151,288, is calculated to deceive.'" Then there is a notice as to the affidavit to be read. It is the second application that I have to dispose of on the present occasion, and the question is what jurisdiction have I to entertain it. It seems to me that I am precluded from entertaining it, because of sect. 69, sub-sect. 4, of the *Patents, Designs, and Trade Marks Acts*, 1883 and 1888. The section, which occurs in the Act of 1888, provides that, "The Board of Trade may, however, if it appears expedient, refer the appeal to the Court, and in that event the Court shall have jurisdiction to hear and determine the appeal, and may make such order as aforesaid." What is my jurisdiction? Simply to hear and determine the appeal. If I were to treat the appeal as

STIRLING, J. 1892 *In re* ROBERTSON, SANDERSON & Co.'s APPLICATION.

an appeal from the refusal of the Registrar to admit the evidence in question, I should be of opinion, as I have already said, that the Registrar was right in his refusal, and no application was made to him for leave to amend the notice of opposition. If I were to entertain the motion I should have to deal with matters which were never brought before the Registrar or considered by him. It appears to me that my function is limited to "hearing and determining the appeal" referred to me by the Board of Trade, and I think, therefore, that I have no jurisdiction to grant the application made by the notice of motion of the 21st of March, 1892; but, at the same time, it would seem to me that, having regard to the circumstances I have already mentioned, such an application is one that is worthy of consideration. I therefore, feeling unable to make an order on the motion, refuse it; but that will be without prejudice to any application which Messrs. *Gillon & Co.* may see fit to make to the Registrar with reference to amendment.

After the decision of the Court above reported had been given, Messrs. *Gillon & Co.*, on the 21st of April, 1892, renewed their application for leave to amend before the Registrar of Trade-marks. Both parties were represented by counsel, and in the result the Registrar held that he had no power to allow any amendments raising new grounds of opposition after the expiration of the three months mentioned in sect. 69; and further, that he was now *functus officio*, the case being before the appellate tribunal. The amendment was consequently refused.

May 6. *Hastings*, Q.C., mentioned the case to the Court, and stated that, under the circumstances, Messrs. *Gillon & Co.* were prepared to allow their appeal from the Registrar to be treated as abandoned, and to pay the costs.

STIRLING, J.:—

Then that will be the order.

Solicitors for *Robertson, Sanderson & Co.: Michael Abrahams, Sons & Co.*

Solicitor for *John Gillon & Co.: J. S. Salaman.*

G. A. S.

MEUX *v.* COBLEY.

KEKEWICH, J.

1891

Dec. 15, 16.

[1890 M. 609.]

Lease—Agricultural Land—Farm—Covenant to cultivate "according to the best Rules of Husbandry"—Market Garden, Conversion into—Breach of Covenant—"Improvements"—Waste—"Ameliorating Waste"—Injury to Inheritance — Injunction — Agricultural Holdings (England) Act, 1883, *ss.* 34, 54.

Under an agricultural lease, in 1889, of a farm near London, consisting of arable and pasture land, the lessee covenanted to yield up the premises at the end of the term, together with all fixtures and "improvements" which might during the term be fixed to or erected on the demised premises, except such fixtures as should be erected by the lessee, and which he should be at liberty to remove in case the lessor should object to purchase the same by valuation; and also that he would "in all respects cultivate and manage the farm, and every part thereof, in a good, proper, and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood." The lessee converted part of the demised premises into a market garden, erecting glass-houses thereon for the cultivation of hot-house produce for the London market. The lessor brought an action for an injunction to restrain the lessee from converting the farm into a market garden, alleging that his doing so was a breach of covenant and was waste, causing injury to the inheritance. At the trial it was proved that other farms in the neighbourhood had been converted into market gardens, that being found to be the most profitable mode of cultivation:—

Held, that the conversion into a market garden did not constitute a breach of the covenant, and, inasmuch as injury had not been thereby caused to the inheritance, was not actionable "waste."

Action dismissed with costs.

To obtain an injunction against a defendant on the ground of "waste," the plaintiff must prove that what the defendant is doing is prejudicial to the inheritance; if it improves the value of the land it is not "waste."

"Ameliorating waste" discussed.

Semble, the *Agricultural Holdings (England) Act*, 1883, has abolished part of the old Common Law doctrine of "waste"; and buildings, such as hot-houses, erected by a lessee on his farm, and having the effect of rendering it more profitable, are "improvements" within the meaning of the Act.

BY a lease dated the 21st of January, 1889, between the Plaintiff, Sir *Henry Meux*, Bart., of the one part, and the Defendant of the other part, the Plaintiff demised unto the Defendant a farm called *Bull Cross Farm*, situate in the several parishes of *Cheshunt*

KEKEWICH, J.
1891
MEUX v. COBLEY.

and *Enfield*, in the counties of *Hertford* and *Middlesex*, together with the messuages and other buildings thereon and therewith occupied; which said farm comprised the several pieces or parcels of land therein described, being partly "arable" and partly "meadow," and containing in the whole about 152 acres; together with the appurtenances, but excepting timber, and except and reserved unto the Plaintiff, his heirs and assigns, all game and the free and exclusive right to enter and come upon the demised premises to hunt, course, shoot, and sport thereon, doing as little injury as possible to the same; to hold the same premises unto the Plaintiff for the term of twenty-one years from the 29th of September, 1888, at the yearly rent of £255; also at a rent of £5 per cent. per annum on money to be laid out by the Plaintiff for draining; also at a yearly rent of £10 for every acre of the meadow or pasture land thereby demised which the Defendant should during the term plough up or convert into arable without the previous consent in writing of the Plaintiff; and at a like yearly rent of £10 for every acre of the arable land thereby demised which the Defendant should cultivate contrary to the covenants thereinafter contained, or which he should neglect to cultivate according to such covenants, without the previous consent in writing of the Plaintiff. And the Defendant covenanted to keep in repair and maintain the demised buildings, gates, and fences, and, at the expiration of the term, to yield up the premises to the Plaintiff in good condition, with all fixtures, improvements, and things which were then, or during the term should or might be fixed to, or erected, or set up, upon any part of the demised premises (except such fixtures as should be erected by or at the expense of the Defendant, and which he should be at liberty to remove in case the Plaintiff should object to purchase the same by valuation); and also that the Defendant would "in all respects cultivate and manage the farm and lands hereby demised, and every part thereof, in a good, proper, and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood." Then followed various covenants on the part of the Defendant of a kind common in an agricultural lease, including a covenant to leave, in the last year of the term, twenty

acres of the arable land then in tillage as naked fallow, the Plaintiff agreeing to allow, out of the last quarter's rent, a proportionate part in respect of such twenty acres; also covenants against ploughing up or converting into tillage any meadow or pasture land without the previous consent in writing of the Plaintiff, and a covenant to preserve the game upon the premises. But the lease contained no provision for securing a rotation of crops. The *Bull Cross Farm* was situate in the neighbourhood of the Plaintiff's mansion-house, and was approached by private roads belonging to the Plaintiff.

Shortly after taking possession under the lease, the Defendant erected on a field described in the lease as "arable" two large glass-houses for the cultivation of tomatoes and other hot-house produce for the London markets, and in February, 1890, he commenced erecting a third glass-house on the same field. The Plaintiff complained that the erection of these glass-houses was without his consent; and in May, 1890, he brought this action, claiming an injunction to restrain the Defendant from allowing the three glass-houses in question to remain on the land, and from erecting any other new houses on the demised premises, and from changing the cultivation of the premises in contravention of the terms of the lease, or so as to commit any waste of the premises, or to cause any loss to, or impose any additional burden on, the Plaintiff.

In his statement of claim the Plaintiff alleged that it was the Defendant's intention to change a great portion of the farm into a market garden, and insisted that what the Defendant had already done, and any such change of cultivation as was intended, was and would be in breach of his covenants; and that such a change of cultivation was "waste" and must cause loss to or impose additional burden on the Plaintiff.

In his statement of defence the Defendant alleged that the growth and production of market garden produce was one of the usual and proper ways of cultivating land on farms in the neighbourhood. He also alleged that in erecting the three houses he had acted with the Plaintiff's sanction or acquiescence. He denied any breach of covenant, or that the change of cultivation was "waste," or must cause any loss to, or impose additional

KEKEWICH, J. 1891 MEUX v. COBLEY.

burden on, the Plaintiff; and he alleged that, on the contrary, the erection of the houses was an improvement to the farm and to the inheritance thereof. He further said that the erection of the houses was authorized by the *Agricultural Holdings (England) Act*, 1883, and that they were buildings which, having regard to the provisions of that Act, might be removed by the tenant at the expiration of his tenancy, or might be bought by the landlord. Issue having been joined, the action now came on for trial.

At the trial several points were raised; but the only one calling for a report was whether the conversion of the farm into a market garden was a breach of covenant. From the evidence it appeared that in the neighbourhood of the Defendant's farm not only were there several market gardens, which had existed as such for many years, but that several farms, originally agricultural, had been converted into or utilized as market gardens, and that, owing to the proximity of the farms to *London*, that had been found to be the most profitable mode of cultivation.

Marten, Q.C., and *P. A. Kingdon*, for the Plaintiff:—

We rest our case mainly on two grounds: first, that on the true construction of the lease the demised premises are, and are intended to be, purely agricultural; and secondly, that, upon the general law, the acts of the Defendant are waste, which he has no right to commit. First, then, we say that this is a purely agricultural lease, and that the Defendant has acted contrary to the terms of the lease in completely changing, as he has done, the character of the land, by converting what is a home farm into a market garden without the Plaintiff's consent. A lessee is not at liberty to change the nature of the premises comprised in the lease: *Bonnett* v. *Sadler* (1). Secondly, the erection of these glass-houses was an act of waste: *Lord Darcy* v. *Askwith* (2); *Jackson* v. *Cator* (3), citing *Brydges* v. *Kilburne* (4). In *Woodfall* on Landlord and Tenant (5), it is stated that "if the tenant convert arable land into wood, or *è converso*, or meadow into arable,

(1) 14 Ves. 526.
(2) Hob. 234.
(3) 5 Ves. 688.
(4) Ibid. 689, n.
(5) 13th Ed. Chap. xvi. s. 5, p. 608.

it is waste; for it changes not only the course of husbandry, but creates a difficulty in the proof of the title; and this would appear to be the case even where the act is done according to the custom of the country for the purpose of amelioration:" *Simmons* v. *Norton* (1); *City of London* v. *Greyme* (2); *Governors of Harrow School* v. *Alderton* (3). The *Agricultural Holdings (England) Act*, 1883 (46 & 47 Vict. c. 61), s. 54, expressly draws a distinction between agricultural land and market gardens. Further, by the conversion of the land into a market garden, the burden on the roads, which are the property of the Plaintiff, will be increased to his detriment: *Corporation of London* v. *Riggs* (4).

Renshaw, Q.C., and *Vernon R. Smith*, for the Defendant:—

We say that, upon the evidence, the Plaintiff has expressly sanctioned, or, at all events, acquiesced in, the erection of these glass-houses; but the real question is whether their erection, and the conversion of the land into a market garden, is not within the covenant to cultivate "according to the best rules of husbandry practised in the neighbourhood," so that no consent on the part of the Plaintiff is required. The evidence shews that the cultivation of land as a market garden is commonly "practised in the neighbourhood," and is, moreover, the most profitable mode of cultivation. There is no direction in the lease as to what crops are to be grown; the tenant, therefore, is at liberty to grow, if he pleases, such crops as are usually grown in a market garden; and if the land is thus converted into a market garden, as sanctioned by the lease, it does not cease to be a market garden by being covered with glass so as to mature market produce earlier than is possible by cultivation in the open ground: *Purser* v. *Local Board of Health for Worthing* (5). The Plaintiff says that the Defendant's acts constitute "waste"; but the real test is whether they are injurious to the inheritance: *Williams' Saunders* (6). The evidence is clear, that the cultivation of the farm as a market garden, so far from being

(1) 7 Bing. 640.
(2) Cro. Jac. 182.
(3) 2 Bos. & P. 86, 88.
(4) 13 Ch. D. 798.
(5) 18 Q. B. D. 818.
(6) Vol. ii. Pt. ii. p. 258, note (o); Ed. 1871, Vol. ii. p. 651.

KEKEWICH, J. 1891 MEUX v. COBLEY.

prejudicial to the inheritance, really improves it. If, therefore, this is "waste" at all, it is "ameliorating waste," with which the Court will not interfere by injunction. In *Barret* v. *Barret* (1), *Richardson*, C.J., said, "The law will not allow that to be waste which is not any ways prejudicial to the inheritance:" a statement of the law referred to with approval by Sir *George Jessel* in *Jones* v. *Chappell* (2), and supported by the House of Lords in *Doherty* v. *Allman* (3). Moreover, the reversion will not be injured by the erection of these glass-houses; for the landlord is protected by sect. 34 of the *Agricultural Holdings* (*England*) *Act*, under which the tenant may remove them at the end of the term, he making good all damage occasioned by the removal, unless the landlord elects to purchase them.

Marten, in reply:—

This is a question of contract, and we are entitled to an injunction irrespective of any question of damage. It is not necessary to shew substantial damage: we may come for an injunction for violation of the terms of the lease. The demise is of a "farm," and the tenant is to cultivate it as such. He does not do so if he covers the whole or any part of the arable land with glass-houses. That is a total change of the holding, and is inconsistent with the covenant as to cultivation, the meaning of which is that the tenant is to grow corn and other open-air crops such as are usually grown on arable land; it does not mean covering the land with houses, and so preventing it being used as "arable" land. In *Purser* v. *Local Board of Health for Worthing* (4), the land was originally a market garden and described as such; and all that the Court held was that a market garden was not the less a market garden because it was covered with glass. In that very case Mr. Justice *Day* (5) draws a distinction between a farm and a market garden. Here the Defendant proposes to do something entirely inconsistent with the description of the land. If the land ceases to be arable the Defendant cannot perform his covenant to cultivate it "according to the best rules of hus-

(1) Hetley, 35.
(2) Law Rep. 20 Eq. 539, 541.
(3) 3 App. Cas. 709, 718, 722.
(4) 18 Q. B. D. 818.
(5) 18 Q. B. D. 820–1.

bandry." I say this is a purely agricultural lease; and it is inconsistent with the terms of the lease and the nature of the thing demised to convert the land into a market garden and cover it with glass-houses. *Jones* v. *Chappell* (1) does not apply. That was a case of two lessees, not of landlord and tenant. The plaintiff held under a lease granted in 1863, and the defendant under a lease granted in 1852 from the same landlord; so that the plaintiff claimed under a title subsequent to that of the defendant. The complaint was as to obstruction of ancient lights and nuisance from noise. The question of waste did not fairly arise in the case. Sir *G. Jessel* decided against the plaintiff on the ground that he took by a title subsequent to that of the defendant, and had no right to sue. Neither does *Doherty* v. *Allman* (2) apply. That was a case of two leases for long terms of years, the plaintiff, the appellant, having the mere reversion in one of them. The decision of the House of Lords proceeded on the ground of the plaintiff being a reversioner at the end of a very long term, and having therefore no substantial interest. That does not apply to a case like this of an agricultural lease for twenty-one years. In the case referred to Lord *Cairns* says expressly (3) that the Court will interpose to prevent the violation of a covenant.

As to the reference to *Williams' Saunders* (4), it is expressly laid down in note (11) that, in a case of landlord and tenant, the tenant cannot alter the character of the land demised, and that, if he does so, it is waste. That law has never been altered.

As to the *Agricultural Holdings Act*, it gives no general right to a tenant to make alterations in the property demised to him: it only provides that he shall have compensation for improvements made with the consent of his landlord. It does not authorize the tenant to do what, as between himself and his landlord, he cannot lawfully do under his lease; nor is there anything in the Act to bar the landlord from compelling his tenant to abstain from doing what he is improperly doing under his lease.

(1) Law Rep. 20 Eq. 539.
(2) 3 App. Cas. 709.
(3) Ibid. 720.
(4) Vol. ii. Pt. ii. p. 258; Ed. 1871, Vol. ii. p. 652.

KEKEWICH, J. 1891 MEUX v. COBLEY.

KEKEWICH, J., held, upon the evidence, that the Plaintiff had, either personally or by his agents, assented to the erection of two out of the three glass-houses, but that whether he had assented to the erection of the third house was doubtful. His Lordship, however, thought that the point as to whether there had been any assent or not was immaterial, the real question being whether the conversion of the farm into a market garden came within the covenant in the lease to cultivate "in a good, proper, and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood," so as to authorize the erection, without any consent on the part of the Plaintiff, of glass-houses such as are commonly used in connection with market gardens. His Lordship then proceeded :—

The question, then, is whether on such a lease as I have before me, being what is called an agricultural lease, a tenant is entitled to put up glass-houses for the production of such known agricultural produce as tomatoes, grapes, mushrooms, and other vegetables which may be grown out of doors, but have to be forced indoors for the purposes of an earlier market. It is to be observed that, although this is a lease of a farm, and is an agricultural lease, not only is there no negative covenant prohibiting the lessee from doing anything of this kind, but there is no provision for any rotation of crops—nothing to indicate a four-course or any other system. So the lessee is left at large. He must do his best to cultivate, the only restriction on his discretion being that he is to do it "in a good, proper, and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood." That is the restriction. Before construing those words, I would refer to one other provision, which is, that the lessee is bound, at the end of the term, to yield up in good condition, not only the buildings which he was bound by prior covenant to keep in repair, but also all fixtures, improvements, and things which were then, or at any time during the term, should or might be fixed to or erected or set up upon any part of the demised premises. So that the lease contemplates there being additions in the way of fixtures which might be also improvements, and which are to be delivered up. Further, it may be noticed that anything of this kind, supposing it to be

rightfully done, is to be done at the tenant's risk. He cannot compel his landlord to take it—that is to say, he cannot compel his landlord to pay for it; and he may, after expending hundreds of pounds on buildings such as these houses, be obliged to go out of possession, having reaped but little benefit from his expenditure, and getting nothing back. That is clearly so except (if I bring in the provisions of the *Agricultural Holdings (England) Act*, 1883) as regards such buildings, if any, as were erected with the landlord's consent.

What is the Defendant doing which is not according to "the best rules of husbandry practised in the neighbourhood"? One must define these words with reference to the changing circumstances of time and life. It is impossible to construe words of this kind as if they were technical words having fixed meanings which are never to change at all, and especially when you have as a guide the stipulation that the rules to be followed are those which are "practised in the neighbourhood." Husbandry is equally applicable to a market garden as to a farm, arable or pasture; and one must regard what is going on in the neighbourhood. Nor can I with any reason exclude my own extra-judicial knowledge of the fact that this metropolis is growing, not only in houses and population, but growing, of course, for that very reason, in its wants; that from year to year the demands on the land in the neighbourhood of the metropolis are increasing, and that from year to year more ground must necessarily be converted into market gardens, or to other purposes, from which the inhabitants of the metropolis can be readily supplied. One knows, without evidence, that in the neighbourhood of *London* a very large portion of the land is given up to grass, because grass is especially valuable in the neighbourhood of a big town; and one knows, too, that a large portion is given up to market gardening, because market gardens are required for the supply of a big town. I have evidence, really undisputed, that within a short distance of this very farm there are market gardens; and I have also evidence, equally undisputed, that there are within a short distance of this farm many farms which are conducted on the principle which Mr. *Cobley* has now adopted, and which he has told us, frankly enough, he has adopted to his

KEKEWICH, J.
1891
MEUX v. COBLEY.

own advantage—that is to say, of combining the farm proper with the market garden proper. The land which might have been, if in a remote district, more properly devoted to turnips and other crops, finds itself covered with savoys and things of that kind. I cannot myself see what there is to prevent that being "according to the best rules of husbandry practised in the neighbourhood," when, as I say, I have evidence that it is done in the neighbourhood largely and increasingly. I cannot rely on the case of *Purser* v. *Local Board of Health for Worthing* (1), because I think Mr. *Marten's* comments on that case were well founded. The question there was whether a market garden is less a market garden if it is covered with glass-houses. I have not to consider that here. I have to consider whether a farm is less a farm because it is converted into a market garden. Therefore, putting aside that case, and really considering the present case according to the usages of mankind, the evidence before me, and the words of the lease, I see no reason why Mr. *Cobley* should not erect such houses as he thinks fit. I limit it to such houses as he thinks fit without going further, because there are provisions in the lease which would prevent his covering the whole farm. He cannot convert the pasture into arable, and therefore he will find some difficulty, I apprehend, in turning the pasture land into market-garden land, even though the market garden, if covered with houses, cannot be ploughed; and there is, moreover, a clause obliging him, in the last year of the term, to leave twenty acres of arable land then in tillage as naked fallow, and there might be some difficulty in turning that into market garden. I only point that out in passing. It struck me, on reading this clause, that he will have to take care how he appropriates a very large portion of his ground to this particular pursuit. But that is only a restriction, and a restriction which I need not discuss further.

I think Mr. *Cobley* is entitled to use his ground for the purpose of a market garden, and if he is (and here the *Worthing Case* does come in), he is entitled to cover it with houses and turn it to advantage in that way. If this is expressly sanctioned by the lease, there can be no question of waste. A man cannot commit

(1) 18 Q. B. D. 818.

waste, even technically, if he is doing that which he is entitled to do by contract—that is to say, he cannot commit waste as against his landlord if his landlord has entered into a special contract enabling him to do it.

Now, is what the Defendant is doing waste? Perhaps, technically, it is. But supposing it to be technically waste, it does not follow that the Plaintiff would recover damages; and if it followed that he would recover damages, it by no means follows that he would get an injunction.

The case of *Jones* v. *Chappell* (1) was referred to usefully, because there Sir *George Jessel* sums up the law shortly in this way (2): "The erection of buildings upon land which improve the value of land is not waste. In order to prove waste you must prove an injury to the inheritance." That is borne out by many cases, including *Governors of Harrow School* v. *Alderton* (3), where, on the plaintiff obtaining a farthing damages, the defendant got leave to enter judgment for himself. But I think it unnecessary to refer to any other case on this point except *Doherty* v. *Allman* (4). That case seems to me to be entirely consistent with *Jones* v. *Chappell*, and to lay down the law in a manner applicable to this case. Besides the passage which was read from Lord *Cairns*' speech (5), there is another passage immediately following, which I think was not read, but which seems to me also in point. His Lordship said (6): "I doubt, further, whether it must not be taken as clear from the evidence here that any jury, or any tribunal judging upon the question of fact, would not say that, if there be technically what in the eye of the Common Law is called waste, still it is that ameliorating waste which has been spoken of in several of the cases cited at the Bar. That which is done if it be technically waste—and here again I will assume in favour of the appellant that it is technically according to the Common Law, waste—yet it seems to me to be that ameliorating waste which so far from doing injury to the inheritance, improves the inheritance." Lord *Blackburn* went into the same point, and says (7): "But

(1) Law Rep. 20 Eq. 539.
(2) Ibid. 541.
(3) 2 Bos. & P. 86.
(4) 3 App. Cas. 709.
(5) Ibid. 722.
(6) Ibid. 723.
(7) App. Cas. 733.

KEKEWICH, J. 1891 MEUX v. COBLEY.

even supposing there was an injury, and that there was something for which there might be damages recovered, is it obligatory upon a Court of Chancery to grant an injunction to prevent it under all circumstances? I think not." So again Sir *George Jessel*, in the case of *Jones* v. *Chappell* (1), to which I have already referred, says (2), that the landlord would be entitled to an injunction against the tenant "if the injury were sufficiently serious."

So that all that is asked here being an injunction—and rightly so, because, unless the injunction is granted the Plaintiff will get nothing worth having—the question I have to consider is, is there any damage, any injury to the inheritance? It has been proved to me conclusively, that what the Defendant is doing, so far from being an injury to the inheritance, is of the greatest possible advantage; and that the addition of these houses, if they are substantially built, and if they are kept in good order, is a most advantageous addition to a farm of this kind in the neighbourhood of *London*.

There is one other point which has been referred to, namely, the effect of the *Agricultural Holdings* (*England*) *Act*, 1883. In the view I have taken, it is unnecessary to decide what the meaning of that Act is; but it seems to me that the Act does go a long way towards getting rid of some of the old Common Law doctrines of waste. It seems to me that the principle of that Act is entirely consistent with the decisions in *Jones* v. *Chappell* and *Doherty* v. *Allman* (3), and that, in the absence of any prohibitive covenant, I should be bound here to hold that these are improvements within the meaning of the Act—improvements, that is to say, for which the tenant could claim compensation on the principle of the Act, if made with consent; and that that Act also, if it had been necessary to rely upon it, would have helped the Defendant. I do not think it necessary, however, to go further into that, although I have thought it right to state my opinion.

I find there is no single point on which the Plaintiff succeeds; and, therefore, there must be judgment for the Defendant, with costs.

Solicitors: *Upton & Britton; H. H. Wells.*

(1) Law Rep. 20 Eq. 539. (2) Law Rep. 20 Eq. 542.
(3) 3 App. Cas. 709. G. I. F. C.

In re BARNEY. BARNEY *v.* BARNEY.

KEKEWICH, J.

1892

Mar. 24, 29.

[1890 B. 4952.]

Trust—Constructive Trust—Trustee de son Tort—Control of Trust Money—Trustee or Agent—Persons assisting Executrix in carrying on Testator's Business in Breach of Trust.

In general *cestuis que trust* may proceed against an agent of their trustee where he has not confined himself to the duties of an agent, but by accepting a delegation of the trust, or by fraudulently mixing himself up with a breach of trust has himself become a trustee by construction of law, *i.e.*, a trustee *de son tort*. But it is essential to the character of a trustee that he should have trust property either actually vested in him, or so far under his control that he is in a position to require that it should be vested in him. A man ought not to be held responsible as a trustee for money under his control unless he can, if he will, put the money into his own pocket, or pay it away as he pleases to some one else.

A testator left his property on trust for his wife and children, but gave no directions as to the carrying on of his business. The widow and executrix, by the advice of her husband's friends, decided to carry on the business. Two of the friends, who were aware that the carrying on of the business would be a breach of trust, agreed to assist her. A banking account was opened in her name, and the bankers were instructed by her not to honour her cheques unless they bore certain initials, which were in fact the initials of the two friends. The estate of the testator was applied in carrying on the business, and the two friends assisted her and initialed the cheques signed by her. There was no suggestion of any fraudulent or unfair dealing on the part of either of them. The business ultimately was carried on at a loss, and an action was brought by some of the children seeking to make the two friends responsible as trustees *de son tort*:—

Held, that the fact that the executrix could not draw any money without their concurrence did not give them such a control over the moneys from time to time drawn out as was necessary in order to establish a case against them as trustees *de son tort*.

While the business was being carried on they from time to time personally supplied goods to the executrix in the ordinary course of business, and were respectively paid by cheques drawn as above-mentioned:—

Held, that they were not trustees for the Plaintiffs of the moneys so received by them respectively.

One of them became trustee of a deed of arrangement under which all the property and effects used in the business were sold and the proceeds distributed among the creditors, of whom he was one:—

Held, that he did not thereby incur any liability to the Plaintiffs as a constructive trustee.

WILLIAM HENRY BARNEY by his will, dated the 5th of September, 1864, appointed his wife *Martha Barney*, and his

KEKEWICH, J.

1892

In re BARNEY. BARNEY *v.* BARNEY.

brother *Thomas Barney* executors and guardians of his children during their minorities, and after directing that all his just debts, funeral and testamentary expenses, should be fully paid with all convenient speed, and bequeathing to his wife a legacy of £50 and all his furniture and certain other personal chattels, gave, devised, and bequeathed all the residue of his real and personal estate to *Martha Barney* and *Thomas Barney* upon trust in their, his or her discretion, either to continue the same or any part or parts thereof in or upon the same state of investment in which the same might be at the time of his decease, or to sell and dispose of the same or any part or parts thereof as they, he, or she should deem most eligible, and invest the proceeds in specified securities, and stand possessed of his residuary estate and the proceeds and investments thereof upon trust to permit his wife to receive the dividends, interest, and produce thereof during her life, and after her decease upon trust for all their children who should attain the age of twenty-one years or die under that age leaving lawful issue, in equal shares. The will contained provisions for the maintenance and advancement of the testator's children, but no reference whatever to the business of the testator.

The testator died on the 10th of February, 1883, leaving his wife *Martha Barney* and seven children, who were then infants, him surviving. The widow alone proved the will, *Thomas Barney* having renounced probate and disclaimed the trusts.

The testator at the time of his death (which resulted from an accident) was carrying on the business of a miller at *Bishopstoke*. After his death the state of his affairs was investigated by Mrs. *Barney*, the executrix, with the assistance of *Thomas Barney* and other friends. By the affidavit sworn on proving the will the net value of the personal estate and effects was stated to be £2062 6*s*. 3*d*. It was considered by Mrs. *Barney* and her friends that if everything was realized, and the proceeds invested, there would not be more than £140 or £150 a year for the maintenance of herself and her children; but it was estimated, having regard to the experience of former years, that if the business were carried on an income of £500 or £600 a year could be made. Mrs. *Barney* had assisted her husband in the business, and was considered to

be qualified to carry it on ; but a difficulty was felt in her doing so unassisted, by reason of her inability to attend at the corn market.

The Defendants *Mitchell* and *Appleford*, who were respectively carrying on business at *Southampton* and *Ringwood*, were friends of the testator, and had had business dealings with him. At the request or suggestion of *Thomas Barney*, they consented to assist Mrs. *Barney* in carrying on the business. It was arranged that each of them should attend at the mill one half-day a week, on different days, to see that the business was being rightly conducted, and that they should buy all corn and goods necessary for Mrs. *Barney* in her own name. With moneys representing the residuary estate of the testator, a banking account was opened in her name, and it was arranged that the cheques, when signed by her, should not be honoured unless initialed by *Mitchell* and *Appleford*.

Before this arrangement was carried out, a case stating the nature of the arrangement was prepared and submitted for the opinion of counsel, on behalf of Mrs. *Barney* and Messrs. *Mitchell* and *Appleford*, with the view of ascertaining how far those gentlemen could act without making themselves in any way responsible as executors *de son tort* or otherwise. Counsel by his written opinion drew attention to the fact (which, he said, appeared from the case to be clearly understood) that Mrs. *Barney* would be committing a breach of trust in carrying on the business without the consent of the Court ; and observed that inasmuch as Mrs. *Barney* had obtained probate of the will there did not seem much fear that the two friends, Mr. *Mitchell* and Mr. *Appleford*, would be made executors *de son tort*, but advised that they should be careful always to hold themselves out as agents and managers, and never to claim the goods or make any payments in the character of executor. He also expressed the opinion that the plan mentioned in the case for the signing of cheques was as good as could be devised, and would not make the two friends liable as executors *de son tort*.

The proposed arrangement was then carried into effect, and a direction to the bankers was given by Mrs. *Barney* to the effect that cheques on her account were not to be honoured

KEKEWICH, J. 1892 *In re* BARNEY. BARNEY *v.* BARNEY.

unless bearing the initials (those of *Mitchell* and *Appleford*) indicated by her. It did not appear that the bankers knew the names of these two gentlemen. Thenceforth *Mitchell* and *Appleford* initialed all the cheques drawn on the banking account. They both attended from time to time at the mill between the 19th of February, 1883, and the end of 1885, and also during the first two or three months of 1886, *Mitchell* doing so more frequently than *Appleford*; and *Mitchell* assisted Mrs. *Barney* with the accounts, and in seeing that the balance-sheets were properly made out. They also made purchases of corn and other things required for the purpose of carrying on the business, and it was proved that sums of money, in the case of *Mitchell* to a considerable amount, and in the case of *Appleford* to a smaller amount, were paid to them personally by cheques drawn in the manner above mentioned, in respect of goods supplied by them to Mrs. *Barney* in the ordinary course of business.

Neither *Mitchell* nor *Appleford* received any remuneration for his services, and there was no suggestion of any fraudulent or unfair dealing on the part of either of them.

In the year 1886, *Mitchell* and *Appleford* ceased to assist Mrs. *Barney* in the management of the business, and the direction to the bank as to the initialling of the cheques was withdrawn by her, and thenceforward the cheques were cashed on her sole signature.

The business was apparently profitable for a time, but subsequently it was carried on at a loss, and ultimately on the 24th of February, 1887, a deed of arrangement was entered into between Mrs. *Barney* of the first part, *Mitchell*, as trustee, of the second part, and the creditors of Mrs. *Barney* (of whom *Mitchell* was one) of the third part, whereby all the property and effects of Mrs. *Barney* were conveyed and assigned to the trustee upon trusts for realization and distribution among the creditors. After the execution of the deed *Mitchell* carried on the business temporarily until it could be sold as a going concern. In February, 1888, a sale was effected, and the amount produced by the sale of the property (other than the furniture, plate and household effects which Mrs. *Barney* was permitted by the creditors to retain), after payment of expenses was distributed

among the creditors, who were stated to have received a dividend on their respective debts.

KEKEWICH, J.

1892

In re BARNEY. BARNEY *v.* BARNEY.

On the 18th of November, 1890, this action was commenced by five of the children of the testator (including four of them who were still infants) against Mrs. *Barney*, *Mitchell*, *Appleford*, and another of the children and her husband, and the assignee of the interest of the seventh child, claiming (*inter alia*) a declaration that *Mitchell* and *Appleford* were, and that each of them was, liable to make good such of the estate and effects of the testator as, after the death of the testator, came into the possession of or were received by them or either of them respectively, or any person or persons, by their order or for their use, or by the order or for the use of either of them respectively, and by them or either of them applied to purposes other than those directed by the testator's will; and also a declaration that Mrs. *Barney*, *Mitchell*, and *Appleford* were, and each of them was, liable to make good to the testator's estate such part of the testator's estate and effects as had been employed by them, or either of them, in carrying on the testator's business after his death, together with all profits made by such employment, or with interest at the rate of 5 per cent. per annum on what had been so employed, and consequential relief.

Mitchell and *Appleford* alone appeared as Defendants, and the case against them alone calls for a report. Mrs. *Barney* gave evidence as a witness in support of the Plaintiffs' case.

Marten, Q.C., and *S. H. Emanuel* for the Plaintiffs:—

It is clear that the Defendants, *Mitchell* and *Appleford*, were cognisant of the trusts of the will, and knew that the carrying on of the business was a breach of trust. Under the arrangement which was carried out, whereby the cheques were initialed by them, they assumed control over the whole residuary estate of the testator, and became, therefore, trustees thereof *de son tort*, and responsible to the Plaintiffs as *cestuis que trust*. The proposition on which the Plaintiffs' claim is based is most clearly expressed by *Bacon*, V.C., in *Lee* v. *Sankey* (1): "It is . . . clearly established that a person who receives into his hands trust

(1) Law Rep. 15 Eq. 204, 211.

KEKEWICH, J.

1892

In re BARNEY. BARNEY *v.* BARNEY.

moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognisant, is personally liable for the consequences which may ensue upon his so dealing." On the same principle, in *Morgan* v. *Stephens* (1), where a solicitor got possession of trust moneys, and allowed the executrix, who was entitled to the income only, to misapply the principal, the Court directed an account against him as if he were a trustee. *Myler* v. *Fitzpatrick* (2) is to the same effect, and shews the difference between a mere agent of the trustee, who is accountable only to his principal, and an agent who acts as a substitute for the trustee, and is accountable to the *cestuis que trust.* The liability of a person so acting is not diminished or affected by the fact that he makes no profit: *Morgan* v. *Stephens.* In *Lee* v. *Sankey* (3) and *Morgan* v. *Stephens* the defendants who were held liable were, no doubt, solicitors. In the case of a person who is not a solicitor it is in general difficult to prove that he was cognisant of the trusts of the will or of the existence of a breach of trust; but that difficulty does not arise in the present case, for the evidence of knowledge is clear. In *Attorney-General* v. *Corporation of Leicester* (4), a town clerk was held responsible for charity moneys which the corporation, who were trustees thereof, permitted him to receive and retain, and which were not applied according to the trusts.

[KEKEWICH, J., referred to *Barnes* v. *Addy* (5).]

That was an entirely different case from the present one. The solicitor there never had the control of the fund. Here, by the arrangement which was made, *Mitchell* and *Appleford* had complete physical control of the fund. It is sufficient for the Plaintiffs to shew permission by these Defendants, without which a breach of trust could not have been committed.

The case against them does not, however, rest on the mere fact that they had control of the trust money. Money belonging to the trust is actually traced into their hands. Each of them supplied goods to Mrs. *Barney*, and was paid by her cheque. They are thus fixed with the actual receipt of moneys which

(1) 3 Giff. 226.
(2) 6 Madd. 360.
(3) Law Rep. 15 Eq. 204.
(4) 7 Beav. 176.
(5) Law Rep. 9 Ch. 244.

they knew belonged to the estate. If a man, who owes a private debt, pays the creditor with money which the latter knows to be trust money, the creditor is responsible as a constructive trustee of the money: see *Pannell* v. *Hurley* (1), in which case bankers were decreed to refund moneys drawn by a trustee from a trust account at the bank and placed there to his private account, against the balance of which the bankers were creditors. To the same effect is *Bodenham* v. *Hoskyns* (2). There is a third point which affects *Mitchell* only. He was made a trustee of the deed of arrangement in 1887. The whole business, stock-in-trade, &c., were assigned to him upon trusts which are obviously inconsistent with the trusts of the will. Therefore we have trust moneys come to the hands of *Mitchell* used for the private debts of Mrs. *Barney* by a person cognizant of all the facts of the case.

The spending of these trust moneys was as much the act of *Mitchell* and of *Appleford* as it was the act of Mrs. *Barney*: *Ramskill* v. *Edwards* (3); *Buckley* on Companies (4).

[They referred also to *Blyth* v. *Fladgate* (5).]

Warmington, Q.C., and *Daniel Jones*, for the Defendants *Mitchell* and *Appleford*, were not called upon.

The other Defendants did not appear.

KEKEWICH, J.:—

Undoubtedly there are persons who can be made responsible as trustees to the full extent of a trustee's responsibility, notwithstanding that they have never been properly appointed trustees, either by the parties or by the Court. That is established by a long series of authorities, and is succinctly expressed by Lord *Selborne* in the case of *Barnes* v. *Addy* (6). He says: "Those who create a trust clothe the trustee with a legal power and control"—mark the word—"over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves

(1) 2 Coll. 241.
(2) 2 D. M. & G. 903.
(3) 31 Ch. D. 100.
(4) 6th Ed. p. 500.
(5) [1891] 1 Ch. 337.
(6) Law Rep. 9 Ch. 251.

KEKEWICH, J.
1892
In re BARNEY.
BARNEY v. BARNEY.

trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*." Fraud apart, they must, according to the language of Lord *Selborne*, and according to the language of all the cases to which I have been referred, make themselves what Lord *Selborne* calls, borrowing an expression from the law of executors, trustees "*de son tort*." When once you have participation in a fraudulent act, then it is immaterial whether the person participating fills the position of trustee *de son tort* or not. The very participation in fraud is conclusive against him, and that is the explanation of more than one of the cases to be found in the books, and of more than one of those cases to which I have been referred. There is no suggestion in the case now before me of the existence of fraud; it has not been mentioned in the argument; it is not suggested by the evidence. Therefore I dismiss fraud from the case, and I have to inquire whether the Defendants, Messrs. *Mitchell* and *Appleford*, have made themselves trustees *de son tort*, and in order to answer that question I must consider what is meant by Lord *Selborne* by that phrase, and what is meant by other Judges by equivalent phrases in other cases.

A trustee, properly so called, must, according to my view, have property committed to his charge. I have had occasion to say before now, and I now say again, that in order to constitute a man a trustee there must be a person or persons for whom he is a trustee—called *cestui* or *cestuis que trust*—and there must be property vested in him of which he is trustee for such person or persons. I do not mean to say that he must have the legal estate. I do not mean to say that the Consols, if Consols be the subject-matter of the trust, must be standing in his name. He may only have the right to call for a transfer—the right to possess the property, as often happens where there is an interval between the appointment of a trustee and the conveyance of the trust property to him. But there must be that which is either vested in him in law, or for which he is entitled to call, about which there is no question; so that his duty plainly is to require that it should be vested in him. And if that is true of a trustee properly appointed, why is it not also true of a trustee *de son tort*? Why should I extend the phrase when I find a person

irregularly acting in a certain way, and make him a trustee irregularly, although he would not be a trustee if he had been regularly appointed to act in the same way? I hold that it is essential to the character of a trustee that he should have trust property either actually vested in him, or so far under his control that he has nothing to do but require that, perhaps by one process, perhaps by another, it should be vested in him. That view seems entirely consistent with all the cases, and especially with those on which reliance is placed on behalf of the Plaintiffs. The passage cited from the judgment of the Vice-Chancellor *Bacon* in *Lee* v. *Sankey* (1) and which is put forward as the proposition of law which supports the Plaintiffs' case, is more than consistent with the proposition I have indicated, for it is based upon it. The Vice-Chancellor says (2): "It is . . . clearly established that a person who receives into his hands trust moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognizant, is personally liable for the consequences which may ensue upon his so dealing." He speaks of the person being liable for the consequences of dealing with trust moneys received into his hands, and that he meant nothing more nor less than money which really did come into his hands is obvious from the form of the decree which the Vice-Chancellor himself referred to on page 213, where he says that, the loss which had occurred must be repaired, and that that could only be done by declaring that the Defendants were liable to make good so much of the trust funds which came to their hands as had not been applied according to the trusts of the will, a passage which was commented on by the present Master of the Rolls in *Wilson* v. *Lord Bury* (3) as shewing the extent of the Vice-Chancellor's view. *Lee* v. *Sankey* is the strongest case in favour of the Plaintiffs, and the authority on which they most rely. *Morgan* v. *Stephens* (4), which was also cited, was an entirely different case from the present one, though it might perhaps have been brought under the rule indicated in *Lee* v. *Sankey*. There the Vice-Chancellor *Stuart* regarded the case as one of gross breach of trust. He says (5): "In

(1) Law Rep. 15 Eq. 204.
(2) Ibid. 211.
(3) 5 Q. B. D. 518, 533.
(4) 3 Giff. 226.
(5) 3 Giff. 237.

KEKEWICH, J. 1892. *In re* BARNEY. BARNEY v. BARNEY.

this case there is evidence of a gross breach of trust. The income of the property was payable to the executrix, and the capital of the fund, having got into the hands of the solicitor, was, through his intervention, spent by the executrix;" so that the case might properly be put as fraud, and fraud existed there.

I have had the curiosity to refer to the most recent work on trusts, the last edition of *Lewin* on Trusts, and I find the law there stated (1), in language which I can adopt fully with the exception of one word which I think might with advantage be omitted. The statement there is, "Generally *cestuis que trust* may proceed against an agent where he has not confined himself to the duties of an agent, but by accepting a delegation of the whole trust, or by fraudulently mixing himself up with a breach of trust, has himself become a trustee by construction of law," that is to say, a trustee *de son tort*. I think the word "whole" would be better omitted, because although, read with the context, it is sufficiently accurate, a person may accept a delegation not of the whole trust—of a will or a settlement, for instance—but of £1000 out of the settled fund or of any other part of it, and by accepting such a delegation would make himself a trustee *de son tort* of that part, notwithstanding that he had not accepted a delegation of the whole trust; and the case of *Myler* v. *Fitzpatrick* (2), which is so often quoted, and which was quoted by the Vice-Chancellor *Stuart* in *Morgan* v. *Stephens* (3), goes entirely on that. It is cited in the argument, and it is cited in the short judgment on p. 237. Taking that as the law applicable to such a case as this, I proceed to apply it to the facts and arguments before me. What happened? On the death of the testator *Barney* it was found that there was little other property than his business for the support of his wife, and of their seven children, all of whom were then infants. The will provided for them, but did not provide for the continuing of the business. I have heard no suggestion that the business could be carried on under the trusts of the will, and I assume that there was no possibility of so construing the will as to allow the business to be carried on. Apparently outside of the business there was nothing out of which the widow

(1) 9th Ed. p. 723.

(2) 6 Madd. 360.

(3) 3 Giff. 226.

and children could be maintained, and so, the widow herself and others meeting in a friendly manner, her friends advised her to continue the business. I think they gave her that advice knowing that she was not legally capable of so doing, and that the trusts of the will were against it, but they thought it the best thing to do, and no one has ventured to say that the advice was given otherwise than honestly and candidly. Mrs. *Barney* had apparently during her husband's life become acquainted with the business, and from what I have seen of her in the witness-box I have no doubt she is a capable woman. But there was difficulty in her carrying on such a business as that of the deceased, and in particular there was a serious obstacle by reason of her incapacity to attend in the corn market; and so an arrangement was made which was at the same time to assist her and to place her under some control. Two gentlemen, the Defendants *Mitchell* and *Appleford*, who had not only been friends of her husband, but had had dealings with him in the way of business, and advanced money to him in respect of purchases made, agreed to act as her friends, and, according to the evidence of what happened, their acts were to be confined to these—they were to look over the accounts, see how the business was going, check the expenditure, and initial the cheques on a banking account which was to be opened in the name of Mrs. *Barney*. It was her account, and her business. They were to assist her in that friendly way without any remuneration, and they were to initial the cheques so that more money might not be spent than was actually required for the purposes of the business —a proper and prudent precaution. It is said that because that was done for some years they became trustees *de son tort*, and that the money which was paid into the bank came under their control. I will put Mr. *Appleford* out of the question. The case against him is slightly weaker than that against Mr. *Mitchell*, and it is better to take the stronger case. Mr. *Mitchell* certainly attended from time to time to the business purposes; he not only went into the accounts, but made them up, and saw that the balance-sheets were properly made. He initialed all the cheques, as also did Mr. *Appleford*. *Thomas Barney*, the brother of the testator, who had disclaimed the trusts of his will, appears

KEKEWICH, J.
1892
In re BARNEY.
BARNEY v. BARNEY.

to have known of all that was done, and was a party to the arrangement. But he only acted as a friend, and although his name has frequently occurred in the proceedings I think I may pass him over. Neither *Mitchell* alone, nor *Appleford* alone, nor the two together, could have drawn on the account. The bank had no instructions to honour their cheques. The bank did not even know the names of these two persons, but knew only that their initials were to be used in future to shew that the cheques of Mrs. *Barney* were proper. It has been argued that the moneys were under their control. In one sense, no doubt, they were—that is to say Mrs. *Barney* could not draw any cheque without their concurrence; but in no other sense were the moneys under their control. I apprehend that when the law says that a man is responsible as a trustee for money under his control, it means money which he can, if he will, put into his own pocket or pay away as he pleases to some one else. That appears to me to be the test. These moneys were not under their control in that sense, and, that being so, they were not moneys come to their hands or received by them, and not moneys of which they were trustees in the sense in which I have used the word.

But it is said that there is a stronger case against them than that. Both *Appleford* and *Mitchell* supplied corn to the business, and *Mitchell* supplied it in large quantities. He did so to some extent in the testator's lifetime, but very much more largely afterwards; and an endeavour has been made to prejudice the case against him by shewing that the bills paid to him after the testator's death were far in excess of those paid during the testator's life. I dismiss any such suggestion. It has not been suggested that he did not supply full value, or that there was any profit made by him other than the proper market profit on the goods supplied; and to hold that a man dealing with a trustee, even though he may know that the trustee has committed a breach of trust, under such circumstances as these, is responsible for the money which he has received for goods supplied, would, in my opinion, be an extension of the doctrine which makes persons trustees *de son tort* and responsible in that character. I decline to extend a doctrine which has, in all

probability, been already extended quite as far as the necessities of mankind require.

Then there is one other point. Eventually the business failed. It seems to have been profitable for a time; but eventually it became necessary to assign what there was for the benefit of the creditors. Mr. *Mitchell* was selected as a trustee. He was also a creditor; and therefore he was not only a trustee for the creditors, but for himself; and it is said, and with truth that the trusts of the deed of arrangement with the creditors were inconsistent with the trusts of the testator's will, and that the property which was intended for the widow and children will now go to the creditors, and the children will lose it. But can I say that a man who was not up to that time, according to my view, liable as a constructive trustee, can be made so responsible for the whole of the trust estate, because he was selected to be an agent to distribute the property comprised in the deed? So to hold would involve an extension of the doctrine which I decline to make, and not the less so because he himself is one of the persons to whom the money will be paid. Therefore, on all these grounds, it seems to me that the case against these gentlemen breaks down, and the action as against them must be dismissed. [His Lordship then proceeded to deliver judgment in the action in the Plaintiffs' favour as against the Defendant, Mrs. *Barney*.]

Solicitors for Plaintiffs: *Lowe & Co.*, agents for *Arthur H. Emanuel, Southampton.*

Solicitors for Defendants, *Mitchell* and *Appleford*: *Jackson & Wright*, agents for *Scotney & Shenton, Winchester.*

C. C. M. D.

UNIVERSITY OF LONDON. Burlington Gardens, LONDON, W.

C. A.
1892
March 22.

CARTER *v.* SILBER.
CARTER *v.* HASLUCK.

[1889 C. 2044.]

Infant—Marriage Settlement—Agreement to Settle after-acquired Property—Repudiation five Years after attaining Majority—Reasonable Time—Infants Relief Act, 1874 (37 & 38 *Vict. c.* 62), *s.* 2 [*Revised Ed. Statutes, vol. xvii., p.* 255].

By a marriage settlement made in October, 1883, the father of the intended husband covenanted with the trustees to pay them £1500 a year during the lifetime of the wife, and such further period as there should be any issue living of the marriage, and the trustees were to pay the £1500 a year to the husband until he should assign or charge the same, and then to apply the same upon the trusts therein mentioned. The settlement also contained an agreement by the husband to vest in the trustees upon certain trusts all property to which he then was or should become entitled under any settlement executed by his father, or under the will of his father or mother, or by virtue of the intestacy of either of them. At the time of the marriage the husband was an infant; and the settlement was not confirmed by the Court on his behalf. He attained his majority in November, 1883.

The father died in May, 1887, and by his will appointed an interest to the husband under certain settlements which he had previously made, and gave the residue of his real and personal estate to his two sons, one of whom was the husband, in equal shares. The husband received the £1500 a year from the trustees during his father's lifetime, and after his death till July, 1888, when he repudiated the settlement.

In an action by the trustees claiming that the husband was bound by the marriage settlement and could not repudiate it, and in the alternative for compensation to the parties disappointed by the repudiation:—

Held, reversing the decision of *Romer*, J., that the settlement, being for the benefit of the infant, was not void but voidable; that he was bound to repudiate the settlement, if at all, within a reasonable time after his coming of age; and that his repudiation came too late and was void.

In order to establish the invalidity of an infant's repudiation of a contract after he comes of age, it is not necessary to shew his knowledge of the facts and of his rights, as in a case of waiver, acquiescence, or election.

THIS was an appeal from a judgment of Mr. Justice *Romer* (1).

The facts, which are fully given in the previous report, may be shortly stated as follows:—

By a marriage settlement dated the 16th of October, 1883,

(1) [1891] 3 Ch. 553.

and made between *A. M. Silber* of the first part, the Defendant *M. A. Silber* (therein stated to be an infant of the age of twenty years and upwards, and the son of the said *A. M. Silber*) of the second part, and the Defendant Lady *Lucy Silber* (then Lady *Lucy Vaughan*, therein stated to be an infant of the age of eighteen years) of the third part, and the Plaintiffs as trustees of the fourth part (being the settlement made previous to the marriage of the Defendants *M. A. Silber* and Lady *Lucy Silber*), the said *A. M. Silber* covenanted to pay to the trustees of the settlement the yearly sum of £1500 during the life of Lady *Lucy Silber*, and during such further period as there should be living any child or grandchild of the marriage, payable as therein mentioned. And it was declared that the trustees should pay the said annual sum of £1500 to the Defendant *M. A. Silber* during his life, or till he should become bankrupt or should charge or assign the same; and after the determination of the interest of the Defendant *M. A. Silber*, upon the trusts therein declared for the benefit of the Defendant Lady *Lucy Silber* and the issue of the marriage. And it was further declared, that if the Defendant *M. A. Silber* then was, or if he or the trustees for the time being should become, entitled to any property whatsoever under any settlement executed or to be executed by the said *A. M. Silber*, or under any appointment made or to be made in exercise of any powers in any such settlement, or under the will of *A. M. Silber* or the will of *Amelia Silber* his wife, or by virtue of any intestacy of either of them, should be vested in the trustees upon the trusts declared by the said marriage settlement.

The settlement was duly executed by all parties, and was approved by the Court of Chancery on behalf of Lady *Lucy Silber*, but not on behalf of the Defendant *M. A. Silber*. The marriage took place, and there were two children of the marriage, the Defendants *V. E. M. Silber* and *E. E. A. Silber*. The Defendant *M. A. Silber* attained his age of twenty-one years on the 19th of November, 1883.

A. M. Silber, the father, by his will dated the 22nd of November, 1878, in exercise of the powers contained in certain settlements which he had previously made in 1865, 1870, and

C. A. 1892

CARTER v. SILBER. CARTER v. HASLUCK.

1875, appointed that, after the determination of the trusts for his widow, the trust estate comprised therein should be held in trust to raise certain sums for his daughters, and to divide the residue between his sons equally. And he devised and bequeathed the residue of his real and personal property to trustees in trust, after payment of testamentary expenses, debts, and legacies, to divide the ultimate residue between his sons equally.

The testator died on the 14th of May, 1887, and his will was proved by his widow, the Defendant *Amelia Silber*.

The testator left two sons, the Defendant *M. A. Silber* and *R. Silber*. The testator paid the annuity of £1500 to the trustees of the marriage settlement during his life, and after his death his widow, as executrix, continued to pay it till the Defendant *M. A. Silber* repudiated his marriage settlement, as hereinafter stated.

In the month of December, 1887, the Defendant *M. A. Silber* first raised the question whether he was bound by his marriage settlement to settle his after-acquired property; and on the 31st of July, 1888, he gave notice to the trustees, through his solicitors, that he declined to be bound by the marriage settlement, on the ground that he was under age at the time, and that it was not approved by the Court on his behalf.

The trustees of the settlement accordingly brought this action, claiming that the Defendant *M. A. Silber* was bound by the settlement of the 16th of October, 1883, and that he could not repudiate it; and in the alternative, that the money received by him in respect of the annuity, and all other interest to which he would have been entitled under the settlement, might be applied in making compensation to the persons disappointed by such repudiation.

Mr. Justice *Romer* held that the settlement was voidable by the Defendant *M. A. Silber* within a reasonable time after he attained twenty-one, and that under the circumstances he had repudiated it in a reasonable time, and was not bound by his not having repudiated it in his father's lifetime; and further, that *M. A. Silber* must repay to the trustees the instalments of the annuity which he had received since his father's death, and that the trustees were entitled to retain the money which

would have been payable to him under the settlement to make compensation to the persons disappointed by his repudiation.

From this judgment *Amelia Silber*, the widow and executrix of *A. M. Silber*, who was one of the persons disappointed by the repudiation, and also the Plaintiffs, appealed.

Chadwyck Healey, Q.C., and *F. Thompson*, for the Appellant, *Amelia Silber*:—

The repudiation by *M. A. Silber* was too late. An infant's settlement is not void but voidable, and is not within the *Infants Relief Act*, 1874: *Duncan* v. *Dixon* (1). He was bound to repudiate within a reasonable time after he came of age. More than three years elapsed after he came of age before the death of his father, and eight months afterwards, before he repudiated. He must be taken to have known the contents of his own marriage settlement. It is said that he was not obliged to repudiate till he knew his full rights, which he could not do till his father's death. But there is no authority for such a proposition. He was bound to repudiate it within a reasonable time after he came of age, whatever his knowledge of the consequences might be, otherwise there would be no limit to the time which he might claim: *Lumsden's Case* (2); *Ebbetts' Case* (3); *Dublin and Wicklow Railway Company* v. *Black* (4); *Holmes* v. *Blogg* (5).

[KAY, L.J., referred to *Smith* v. *Lucas* (6).]

If the repudiation by *M. A. Silber* is held to be valid, it must date back to the time of his coming of age, and he must apply the instalments of the annuity which he has received since that time to compensating those who are disappointed: *Codrington* v. *Lindsay* (7).

Neville, Q.C., and *Maidlow*, for the Plaintiffs, supported the appeal.

(1) 44 Ch. D. 211.
(2) Law Rep. 4 Ch. 31.
(3) Ibid. 5 Ch. 302.
(4) 8 Ex. 181.
(5) 8 Taunt. 35.
(6) 18 Ch. D. 531.
(7) Law Rep. 8 Ch. 578; 7 H. L. 854.

C. A. 1892 CARTER v. SILBER. CARTER v. HASLUCK.

Crackanthorpe, Q.C., and *Butcher*, for the Defendant *M. A. Silber*; and *Morton Smith*, and *Ingpen*, for the mortgagees:—

The covenant to settle future property was not for the benefit of the infant, nor did it form part of the marriage contract. The object of it was to relieve the estate of the father. It was, therefore, void as against the infant, and no repudiation was necessary. But, assuming that it was voidable only, the time which elapsed before the Defendant repudiated was not unreasonable. The evidence shews that he did not, in fact, know during his father's lifetime that the settlement contained a covenant to settle the after-acquired property; nor could he know what his interest would be under his father's will. He was not, therefore, bound to repudiate till his father's death, and he repudiated within a reasonable time after that event. The infant has the same equity as a person who is bound to elect between different rights: he must first know what his rights are.

Method, *Hornell*, *Boome*, *A. Chitty*, *H. Terrell*, *Wallace*, *Franks*, *Waggett*, and *Yate Lee*, for other parties.

LINDLEY, L.J.:—

This is an appeal from an order made by Mr. Justice *Romer*, and the question raised by the appeal is a very simple one—namely, whether the Defendant, *M. A. Silber*, was or was not entitled to repudiate his covenant to settle after-acquired property which was contained in the settlement made on his marriage. In order to determine that, it will be convenient to state shortly what the position of affairs was. It appears that by certain settlements made by his father in 1865, 1870, and 1875, certain policies, and also a sum of £40,000 under the last settlement, were settled by the father upon his wife and children; and by one of those settlements—the settlement of 1870—the son, who is this Defendant, was to have a share of the policy monies comprised in that settlement when he attained twenty-one. The father had made a will in 1878 making appointments under these settlements, and he had disposed of the residue to his two sons on attaining twenty-one. The Defendant being

under age, in October, 1883, married, and upon that marriage the settlement with which we have to deal was executed. Shortly after that the Defendant attained twenty-one. The settlement was carried out in the ordinary course—that is to say, the funds comprised in it and capable of being paid over were paid over to the trustees and applied by them properly. In 1886 the father made a codicil slightly varying his will, but for all practical purposes confirming it; and in May, 1887, the father died. Then, of course, the policies fell in, and a question arose as to whether the Defendant's share of the policy monies comprised in the settlement of 1870 ought to be handed over to the trustees of his marriage settlement or not. That gave rise to a controversy; and in December, 1887, if not before, his solicitors found out that there was this covenant in the settlement, which they at all events were not aware of before, and the Defendant himself says he did not know of it before. The consequence of that was that the money which fell in was paid over to the trustees of the settlement without prejudice to any question. In July, 1888, the Defendant repudiated the covenant into which he had entered. The question which has been discussed is, whether it was competent for the Defendant then to repudiate that settlement. Now, the settlement in question was made by his father and himself. The father covenanted to pay to the trustees during the life of the wife, and so long as there should be any child or grandchildren of the marriage, £1500 per annum, and there were provisions in the settlement for reducing that sum if the father put money or capital into the hands of the trustees the income of which would produce it. There was also a settlement by the father of a certain policy. The son took interests both in the £1500 a year and in the policy; the exact nature of the limitations I need not refer to. Then there was a covenant by the son to settle any property which he might afterwards acquire under either his father or his mother. That is the short effect of it. He says, and with truth, that when that deed was executed he was a minor: he was a few months under twenty-one.

The first question which we have to consider is the question of law whether that deed so executed by him and his father on

C. A. 1892 CARTER v. SILBER. CARTER v. HASLUCK. Lindley, L.J.

the son's marriage was void or voidable. Now, I take it it is quite plain that, applying to this case the principles which were expounded in the well-known case of *Zouch* v. *Parsons* (1) and which have been acted upon ever since, it would be quite impossible to say that this was a void as distinguished from a voidable deed; and, in fact, none of the counsel who have addressed us have seriously controverted that proposition. It may be for the benefit of the infant. An instrument executed upon the marriage of an infant, settling property on him and by him, must be very strangely framed to justify the conclusion that it could not be for the infant's benefit. Possibly you might conceive such a case; you might have such a strange settlement that you could say that; but I do not think anybody in Court ever saw one, and my imagination is not vivid enough to enable me to picture one. I proceed, therefore, upon the assumption that this was a voidable and not a void deed.

Under those circumstances, what is the state of the law with reference to a voidable instrument executed by an infant when that infant attains twenty-one? Has he to elect to ratify it? Has he to ratify it, or is it binding upon him until he elects to avoid it? It appears to me that this point has been long settled by authority. It is binding upon him until he repudiates it. Further, I take it, the law is perfectly well settled that he must repudiate it, if at all, within a reasonable time after he attains twenty-one—that is, the time from which the reasonable time begins to run. The cases which settle this are those which relate to shares in companies, of which there are a great many in the books. I take it the law is perfectly plain, and there is a very short note of it in a very accurate book, *Buller* and *Leake* on Pleadings (2), which is to this effect: "When a person is sued upon obligations arising out of property which he has become possessed of under a contract, as shares in a company, he cannot avoid the obligation by the simple defence that he was an infant at the time of acquiring the property, he must further plead that before coming of age or within a reasonable time in that behalf after coming of age he repudiated the contract on that ground and disclaimed the property." There are several cases

(1) 3 Burr. 1794. (2) 4th Ed. pt. ii. p. 220.

which settle that beyond all controversy, and it is not necessary, therefore, to allude to that further.

Therefore, his legal position was this. Having attained twenty-one, he had a reasonable time to consider what he would do—whether he would repudiate or whether he would not. What is a reasonable time? That, I agree, depends upon all the circumstances of each particular case. A short time may do in some cases, a longer time may do in others. But what time elapsed before this infant repudiated? He never repudiated for nearly four years after he attained twenty-one. In the meantime his father had died. It was impossible for his father to rearrange his own affairs, as he very likely would have done if his son had repudiated this deed in his father's lifetime. It is impossible to hold that it was competent for the son to repudiate this settlement when he did. The Court cannot say that three and a half or four years, under the circumstances of this case, is a reasonable time in which to repudiate the settlement. It is not a question of weeks or months. Whether the Defendant could have repudiated the deed in five or six or nine months after he came of age I do not care to discuss; but to ask us to hold that he repudiated within a reasonable time is to ask us to hold that which no reasonable man could think of holding.

That really settles the case so far as this point is concerned.

BOWEN, L.J.:—

I am of the same opinion. There can be no doubt, I think, that the contract which this gentleman seeks to repudiate is a voidable and not a void contract. Subject to exceptions on either side of the line—putting away on the one hand the limited class of cases in which infants' contracts are void, and on the other side of the line the cases where the infant is bound by contracts—speaking broadly, the principle of the law is clear. An infant, being a person of immature mind, although he may contract, cannot contract himself out of the right when he arrives at full age to affirm or disaffirm what he has done at his option. When, therefore, he arrives at full age he arrives at a time when it is necessary for him, if he desires to do so, to state that he means to repudiate the contract, which otherwise

C. A. 1892 CARTER v. SILBER. CARTER v. HASLUCK. Bowen, L.J.

would bind him. He has a reasonable time to exercise his option and within which to repudiate, and I agree with the learned Judge below that such reasonable time is to be measured with reference to all the circumstances of the case. But the point at which I break off from the path followed by Mr. Justice *Romer* is where he considers that this reasonable time within which the infant must exercise his option did not expire during the father's life, which was over three years. Such a view seems to me to neglect the importance to be attached to the position of the parties at the time when the infant came of age. When the infant came of age he knew perfectly well of the fact of the settlement. I will assume that he did not know—that is to say, that he had not present to his mind—the fact that the settlement contained a covenant to settle after-acquired property. But he knew of the settlement; he knew there was a document which, unless he repudiated it, would bind him, and that it was a document which affected himself. He therefore cannot afterwards say that although he knew of the settlement he did not take the trouble to go and look to see what was in it, and that he is not bound by it in consequence. It was a contract he himself had made. If he cannot plead ignorance of the contents of the settlement and the existence of this covenant to settle after-acquired property, can he pray in aid the proposition that he did not know exactly his rights—that is to say, that he did not know that he had a right to repudiate the contract? It is the law of *England* that he cannot pray in aid his ignorance of the right of an infant to repudiate after he comes of age; and being fixed constructively with knowledge of what was in the settlement, the law will not allow him to benefit by his ignorance of his right to repudiate. Therefore, I can see no reason for giving him the benefit of the time during which his father was living. He ought at once to have begun to consider when he came of age what his position was, and it was essential that he should do so. Otherwise he enjoys the benefit during his father's lifetime of all that comes to him upon the assumption that the deed is not to be invalidated; he permits his father to die without making any disposition other than that which he had made upon the

faith that the settlement should subsist, and then, after his father's death, without even repaying what he had taken under the settlement, he claims that he has a right to repudiate. I cannot believe that this can be right. It seems to me, apart from the difficulty that he does not offer to repay what he has received during his father's lifetime, that a reasonable time had elapsed long before the father's death. It is unnecessary, therefore, to consider whether, supposing it did not begin to run until the death of the father, the delay since that time might be excused. That seems to me the short, clear ground, as my learned Brother has said, on which our judgment is to go, and I should not have added anything to what he has said but for the fact that we are dealing with the judgment of one whom we all respect and value, Mr. Justice *Romer*. An attempt indeed was made by one of the learned counsel to evade the difficulty by the suggestion that this contract of the infant was not voidable but void altogether, so that there was no necessity for repudiation at all. But a covenant to settle after-acquired property cannot be said to be a covenant which cannot possibly be to the interest of the infant, and in most cases in which it is contained in a marriage settlement one may assume that it is part of the consideration which the infant gives for the marriage arrangement which is being made, and to dissever that portion of the consideration from the rest would seem to me, in ninety-nine cases out of a hundred, to be impossible. Although there may be a case in which upon the whole construction of the deed we could see clearly that the covenant to settle after-acquired property was not for the benefit of the infant, yet in this particular suit before us there is no pretext for saying so, and, therefore, I think that argument must fail altogether.

KAY, L.J.:—

I also respectfully differ from the learned Judge in the Court below. I have no doubt at all that this covenant to settle after-acquired property made by the infant a short time before he came of age, being inserted in a marriage settlement which seems to have been in every respect greatly for his benefit, was one which was not a void covenant, but only voidable at his

C. A. 1892 CARTER v. SILBER. CARTER v. HASLUCK. Kay, L.J.

choice when he came of age. He had undoubtedly a right when he came of age to say, "I was an infant when I entered into that covenant; the covenant binds me unless I repudiate it; but I now exercise the right which I have to repudiate that covenant." But then, within what time must he do it? Now, of course, it is absolutely impossible to lay down any exact limitation of the time within which that right of repudiation may be exercised. I do not think that the rule can be better stated than in the words of *Dallas*, J., in the case of *Holmes* v. *Blogg* (1); he says: "In every instance of a contract voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time; and, if the case before the Court were that simple case, I should be disposed to hold, that, as the infant had not given express notice of disaffirmance within four months, he had not given notice of disaffirmance in reasonable time." And *Park*, J., says: "In all the cases, it has been allowed to infants at full age to affirm or disaffirm contracts made by them during infancy; but do those cases go the length of saying, that an infant may take three or four months to make his election?" I do not read that as laying down an absolute rule that in every case the election must be made within three or four months after the infant attains twenty-one, but I do read it as stating, and I agree with the statement, that the time within which that right of repudiation must be exercised must be a reasonable time after the infant attains twenty-one, and that the time begins to run from the moment that he attains twenty-one. I asked during the argument, and asked in vain, for any authority for this proposition, which was really the main ground of the argument before us, that in computing that reasonable time there ought to be taken into consideration the question whether the infant was aware of his right to repudiate. The right to repudiate is one which is given by law, and everybody must be taken to know the law, and this is precisely an instance, to my mind, in which that rule is entirely applicable. The argument sought to liken this case to the case of acquiescence, or waiver, or election, in each of which, before the person can be said to be bound by acquiescence

(1) 8 Taunt. 39, 41.

or waiver, or to be put to his election, it has been held again and again he must be aware of the facts and of his rights. I disagree entirely with the attempt to apply that doctrine to a case of repudiation by an infant after he attains twenty-one. I do not believe any authority can be found in which that doctrine has been applied to the right of repudiation by an infant.

Then the question is whether in this case the time that did elapse before this gentleman attempted to repudiate after he attained twenty-one was a reasonable time. It was some years. He knew that he had executed a settlement; he says now, "I did not know," or "I did not remember," or "It was not present to my mind," which probably would be a more correct way of stating the result of his evidence, "that there was in this settlement a covenant by me to settle after-acquired property." But he knew he had executed the settlement; he knew he was receiving the benefits under the settlement; and if he did not choose to look into the settlement and see to what extent it bound him, and any property that might come to him, that cannot be taken as an excuse, in my opinion, for his not having exercised his right of disaffirmance some years at least before he attempted to do so.

Another consideration is also of the greatest possible weight in this case: it is this—this settlement was made giving large advantages to the son, while he was an infant, by his father. The father was the person who brought property into the settlement on the part of the intended husband. The father had, under a marriage settlement of his own, a power of appointment over certain funds among his children, and he might have exercised that power of appointment by appointing the smallest possible share to this particular son, and by appointing the rest to the other children. He exercised that power by will, and not in his lifetime by deed, as he perhaps might have done, and it was not until after the death of the father, and after the son knew of the benefits he got under the appointments made by the father's will, that he attempted to exercise his right of repudiation. As I read the learned Judge's judgment, he thinks he was right in doing that. But the obvious answer is, if this son had exercised his right of repudiation of this

C. A.
1892
CARTER
v.
SILBER.
CARTER
v.
HASLUCK.
Kay, L.J.

settlement in the father's lifetime, the probability is—I should say almost the certainty—that the father would have made a very different provision by his will from that which he actually made. That seems to be a conclusive answer if it was necessary to that part of the case.

I think it is a case in which the time within which the son could repudiate expired certainly long before his father died, and that the repudiation which he attempted to make after his father's death was very much too late, and that therefore this settlement is as binding upon the son as though he had been of full age at the time when he put his hand and seal to it.

Solicitors: *Hicks & Arnold; Phipps & Watkins.*

M. W.

CHITTY, J.
1892
April 29;
May 3.

In re BOWEN.
JAMES *v.* JAMES.

[1891 B. 5657.]

Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5—*Married Woman—Will made during Coverture prior to the Act—"Separate property" acquired after the Act.*

The will of a married woman, who dies in the lifetime of her husband, made during coverture and prior to the coming into operation of the *Married Women's Property Act*, 1882, she having at the time capacity to make will, is effectual without re-execution to pass separate property which she may acquire under the provisions of the Act.

By a settlement dated in 1839, made upon the marriage of *J. Bowen*, the testator in the action, with *Elizabeth* his wife, real and personal estate was vested in trustees upon trust, in the events which happened, for such persons as *Elizabeth Bowen* should by deed or will appoint.

On the 21st of December, 1872, *Elizabeth Bowen* made her will, and thereby exercised the power of appointment conferred on her by her marriage settlement, and bequeathed her residuary real and personal estate upon trusts in favour of *Henry Bowen* and his issue.

In December, 1884, *Elizabeth Bowen* became entitled as next of kin of a niece, to a sum of £2440.

Elizabeth Bowen died on the 7th of February, 1885, whereupon the testator, *J. Bowen*, obtained a grant of letters of administration to his wife's personal estate not comprised in the settlement, and also a grant of letters of administration to the personal estate of the niece, and obtained possession of this sum of £2440.

J. Bowen died in 1889, and, a claim having been made by the representatives of *Henry Bowen*, who was then dead, in respect of this sum of £2440 against the executor of *J. Bowen*, insisting that the testator was not entitled to the money as administrator of his wife, but that it had passed under her will, an originating summons was taken out by the executor of *J. Bowen*, as Plaintiff, against the residuary legatees of the testator and the new trustees

CHITTY, J. 1892 *In re* BOWEN. JAMES *v.* JAMES.

of *Elizabeth Bowen's* will, recently appointed by the legal personal representative of the last surviving trustee, in order to have the question determined.

Dibdin, for the Plaintiff.

Byrne, Q.C., and *R. F. Norton*, for the residuary legatees of the testator, *J. Bowen*:—

The will of a woman made during coverture is not effective to pass any property she acquires after her coverture has ceased: *Willock* v. *Noble* (1); and this is still law notwithstanding the *Married Women's Property Act*, 1882: *In re Price* (2); *In re Cuno* (3). By sect. 1, sub-sect. 1, of that Act a married woman is empowered to dispose by will of property which she acquires by virtue of that Act, "as if she were a *feme sole*"; hence she must, after the coming into operation of that Act, execute a new will or re-execute her old will, as she becomes, on the coming into operation of that Act, for the purpose of the property she acquires by virtue thereof, "a *feme sole*," and hence her will made during her coverture, and before she became for the purpose of the Act a *feme sole*, cannot operate on the property she acquires as a *feme sole*: *Willock* v. *Noble*.

The separate property to which a married woman becomes entitled by virtue of the Act is a different kind of property from property settled to her separate use by contract or will (4). Property which a married woman acquired under the *Married Women's Property Act*, 1870, is, by the terms of that Act, "deemed and taken to be property held and settled to her separate use," and was similar in all its incidents to property settled to her separate use by contract or will, but the terms of the present Act are entirely different—property a married woman acquires under the present Act is to be held and disposed of by will or otherwise "as her separate property, in the same manner as if she were a *feme sole*," and is a different kind of property with different incidents from property settled to her separate use, and she

(1) Law Rep. 7 H. L. 580.
(2) 28 Ch. D. 709.
(3) 43 Ch. D. 12.
(4) *Wolstenholme's Conveyancing and Settled Land Acts*, 6th Ed. p. 201.

acquires by the Act a new capacity to dispose of it, and must make her will after she has acquired such new capacity.

Farwell, Q.C., and *Vaughan Hawkins*, for the trustees of *Elizabeth Bowen's* will:—

The words used in sect. 1 of the Act are not new words. They appear to be copied from Lord *Thurlow's* judgment in *Hulme* v. *Tenant* (1).

The words "*feme sole*" must mean a person who has never been married. There is no reason for adopting the suggestion that they should mean a woman who has been married and whose husband is dead; the result would be to introduce an absurd anomaly. The object of the Act is to give all married women in respect of property within the Act the same rights and powers as they have in respect of property given to them for their separate use.

[They also referred to *Earl of Charlemont* v. *Spencer* (2).]

Warrington, and *W. Rees Davies*, for the executrix of *Elizabeth Bowen*.

Byrne, in reply.

CHITTY, J.:—

The question is whether the sum of £2440 passed by the testatrix's will, and on this two points arise—one of general law, and the other of construction. When the will was made, the testatrix was a *feme covert* entitled to exercise various powers of appointment, and also possessed of property for her separate use. She had therefore capacity to make the will.

Subject to the question of construction, it is admitted—and it could indeed scarcely be contested—that her will would have operated to dispose of property settled to her separate use after the date of her will; in other words, that it would have passed her after-acquired separate property. But it is said that one class of property will not so pass, namely, that which became her separate property by virtue of the *Married Women's Property Act*, 1882.

Speaking generally, the intention of that Act was to enlarge

(1) 1 Bro. C. C. 16. (2) 11 L. R. Ir. 347, 490.

CHITTY, J.
1892
In re BOWEN.
JAMES *v.* JAMES.

the capacity of married women; nevertheless it is said that sects. 1 and 5 are so framed that the will does not include this sum, on the ground that it came to the testatrix under the Act subsequently to the date of her will. The argument, in another form, is this—that whatever intention to pass separate property may be shewn by the will, it will be insufficient to pass what she acquired by virtue of the Act; to do this it is necessary that the will should have been re-executed after the date of the Act coming into operation, namely, after the 1st of January, 1883.

Now, sects. 1 and 5 are as follows. [His Lordship having read the sections, continued:—]

The gist of the argument is on the words "in the same manner as if she were a *feme sole*," and the argument in support of the proposition that this sum did not pass by the will, amounts, when analyzed, to reading these words as equivalent to "in the same manner as if her husband were then dead," and on this alteration in the words the further proposition is advanced, based on the case of *Willock* v. *Noble* (1), that for the purposes of this Act the testatrix is to be regarded as having become a widow at the date when it came into operation, and that this case applies so as to prevent the separate property she acquired by virtue of the Act from passing by her will.

But this seems to me not merely an alteration, but a perversion of the fair meaning of these words in the section. The object was to enable a married woman to dispose of her property, and the words "as if she were a *feme sole*" were inserted so as to shew that she was to have the same wide powers as a *feme sole* had; that is to say, to get rid of the disability of coverture.

The words might equally be interpreted "as if she had become a spinster or a widow," or again, "as if she had never been married"; but in neither case are these the words of the Act. The phraseology of the section seems to have been taken by the Legislature from the language of Lord *Thurlow* in *Hulme* v. *Tenant* (2), namely, that a *feme covert* acting in respect of her separate property is competent to act in all respects as if she were a *feme sole*. The term separate property is often used in the same judgment, and I can see no just distinction between

(1) Law Rep. 7 H. L. 580. (2) 1 Bro. C. C. 16.

this and "property belonging to her for her separate use." It is a technical phrase and one well understood.

The result is that this will, which this married woman had capacity to make both by virtue of the powers conferred on her and by virtue of the separate property to which she was entitled otherwise than under the *Married Women's Property Act*, 1882, is valid to pass this sum, assuming its terms to be sufficient for this purpose, and I can find nothing in this Act which precludes her will from operating upon property which the Act itself made her separate property. It would indeed be anomalous to except from the operation of the Act what was made her separate property by the Act.

[His Lordship then, upon the construction of the will, held that its terms were sufficient to pass the sum in question.]

Solicitors: *Bridges, Sawtell, Heywood & Co.*, agents for *Bendall, Milford Haven; G. L. P. Eyre & Co.*, agents for *Morgan & Richardson, Cardigan; Jordan & Davies*, agents for *Davies, George, & Davies, Haverfordwest.*

G. M.

In re GREENWOOD. GREENWOOD *v.* GREENWOOD.

[1892 G. 639.]

Will—Annuity to Widow—Legacies—Real Estate—Annuity in satisfaction of Dower — Insufficiency of Personal Estate—Priority—Dower Act, 1833 (3 *& 4 Wm.* 4, *c.* 105), *s.* 12 [*Revised Ed. Statutes, vol. vii., p.* 619].

Where a testator by his will disposes of all his real estate, out of which, if he died intestate, his widow would be entitled to dower, and gives a legacy to his wife which he declares to be in satisfaction of her dower, and also other legacies, and dies seised of real estate, his widow is not entitled to priority over the other legatees in the event of the personal estate being insufficient to pay all the legacies in full.

The *dictum* of *Malins*, V.C., in *Roper* v. *Roper* (1) disapproved of and not followed.

ROBERT GREENWOOD, who was married to the Plaintiff after the *Dower Act*, 1833 (3 & 4 Wm. 4, c. 105), came into operation, made his will, dated the 24th of March, 1873, and

(1) 3 Ch. D. 714, 719.

CHITTY, J. 1892 *In re* GREENWOOD. GREENWOOD *v.* GREENWOOD.

after appointing his wife (the Plaintiff) and his nephews *John Greenwood* and the Defendant *William Greenwood* trustees and executors, he devised his messuage at *Hare Hill* to his wife for her life or widowhood, and bequeathed to his wife an annuity of £500 for her life if she should so long continue his widow, and if she should marry again, then an annuity of £300 only for the remainder of her life, and after devising all his real estate, subject to his wife's interest in *Hare Hill*, to his son *John Arthur Greenwood*, he bequeathed to his trustees two several sums of £10,000 each, upon trusts therein mentioned, for the benefit of his daughters the Defendants, *Mary Helena Greenwood* and *Sarah Frances Greenwood*.

By a codicil dated the 27th of March, 1873, the testator declared that "the provision made for my said wife by my will is in satisfaction of her dower or thirds or freebench out of my real estate."

The testator died on the 4th of April, 1873, and his will and codicil were proved on the 24th of July, 1873, by all the executors named in the will.

The testator died seised of real estate, out of which, had he died intestate, his widow would have been entitled to dower. *Hare Hill* was a small part of such real estate.

The testator's personal estate was insufficient to pay the annuity of £500 to his widow and the legacies of £10,000 each to his daughters in full.

This summons was issued for the purpose of determining the question whether the Plaintiff's annuity of £500 was payable in priority to the two legacies of £10,000 each bequeathed in trust for the testator's daughters.

The daughters were infants at the death of their father, but had since attained twenty-one. *John Greenwood*, one of the trustees, was dead.

The Plaintiff's annuity of £500 had been duly paid up to April, 1887, since which time she had received only £200 a year. The legacies to the daughters had not been paid.

R. F. Norton, for the widow:—

I submit that the annuity to the widow, which may be taken

to be a legacy, has priority over the other legacies by virtue of the 12th section of the *Dower Act*, 1833, which provides that nothing in the Act contained shall interfere with any rule of equity or of any Ecclesiastical Court by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies, the rule of equity being that where there is an insufficient estate for payment of all the legacies in full, such legacies are considered as the price for the relinquishment of a right, and are not liable to abatement with other legacies: *Burridge* v. *Bradyl* (1); *Heath* v. *Dendy* (2); *Blower* v. *Morret* (3).

Where the testator leaves no real estate the widow's legacy has no priority: *Acey* v. *Simpson* (4).

In this case the testator died possessed of real estate out of which, had he died intestate, his widow would have been entitled to dower. The widow cannot claim her dower by reason of the disposition in the will; but the right of the widow to dower having been barred by the will itself, the 12th section of the Act comes in, and her husband having given her an annuity in satisfaction of dower, her rights are just the same as to priority as if the Act had not been passed. This appears to have been the opinion of *Malins*, V.C., in *Roper* v. *Roper* (5), though in the circumstances of that case it was unnecessary for him to decide that point. If this is not the effect of the section, then the section is altogether inoperative.

Wiglesworth, for the daughters of the testator:—

Sect. 12 only applies to cases where the widow is entitled to dower. It would be a strange inconsistency if the section was construed to mean that where a man by his will disposes of his lands and gives his widow a legacy in lieu of her dower that this gift has the effect of reviving her right to dower and makes her a purchaser of the legacy entitling her, in the event of an insufficient estate, to priority over other legatees.

Norton, in reply.

(1) 1 P. Wms. 127.
(2) 1 Russ. 543.
(3) 2 Ves. Sen. 420.
(4) 5 Beav. 35.
(5) 3 Ch. D. 714, 719.

CHITTY, J. 1892. June 25. CHITTY, J.:—

1892

In re GREENWOOD. GREENWOOD *v.* GREENWOOD.

The widow claims priority for the annuity given to her by her husband's will and codicil over the other legacies bequeathed. The marriage took place after the 1st of January, 1834. Her claim is founded on the 12th section of the *Dower Act*, 1833 (3 & 4 Wm. 4, c. 105).

The section runs thus: "Nothing in this Act contained shall interfere with any rule of equity, or of any Ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies." The annuity is a legacy. The first question is, what is the rule referred to? It is the rule which was subsisting when the Act passed. The rule was that where a legacy was bequeathed to the widow in satisfaction of her right to dower, she was regarded as a purchaser of the legacy, and if she elected to take the legacy in lieu of the dower, the legacy had priority over other legacies, if the personal estate proved insufficient for payment of all the legacies in full: *Burridge* v. *Bradyl* (1); *Blower* v. *Morret* (2); *Davenhill* v. *Fletcher* (3); *Shelford's* Real Property Statutes (4). The rule being founded on her right to dower, had no application where she had no such right. Accordingly, it was decided in *Acey* v. *Simpson* (5), a case to which the Act of Wm. 4 did not extend, that a legacy given to a widow in lieu and satisfaction of dower had no priority over other legacies where the testator left no real estate. She was not a purchaser of the legacy.

In the case before me the facts are as follows: The testator died seised of real estate out of which, had he died intestate, his widow would have been entitled to dower. By his will, after devising to her for life or widowhood his messuage at *Hare Hill*, he devised all his real estate to his son subject only to her interest in the messuage at *Hare Hill*. By this disposition he effectually barred her right to dower. Her annuity is bequeathed to her by the will, and is payable out of the personal estate only. The legacies over which she seeks priority are pecuniary legacies bequeathed to or for the benefit of the testator's daughters. No

(1) 1 P. Wms. 127.
(2) 2 Ves. Sen. 420.
(3) Amb. 244.
(4) 8th Ed. p. 431.
(5) 5 Beav. 35.

priority is given by the will to the widow's annuity. By his codicil the testator declared that the provision made for his wife by his will was in satisfaction of her dower out of his real estate, and certain other claims which he apprehended she might make against his estate. It does not appear that she had any such claims, and no argument for the widow was founded on the ground of the apprehended claims.

The Act provides several modes by which a husband may bar his wife's dower where the marriage takes place after the 1st of January, 1834. The provisions are to be found in sects. 4 to 9, both inclusive, of the Act. It is unnecessary to enumerate the various modes by which he can bar the dower. I will mention some only—an absolute disposition in his lifetime, or by his will (sect. 4), a declaration in the deed of conveyance or any other deed (sect. 6), a declaration by will against dower (sect. 7), a devise of real estate to the widow (sect. 9), are modes by which the dower may be barred. The 8th section relates to restrictions to which the widow's right to dower may be subjected by the husband's will.

The result is this: There is no distinction as to the effect of the various modes by which the dower may be barred: they are all made equally efficacious.

The meaning of the 12th section was considered by *Malins*, V.C., in *Roper* v. *Roper* (1). He held that the widow had no priority over other legacies in respect of any annuity bequeathed to her by her husband in satisfaction of dower, where the only real estate of the testator had been conveyed to him with a declaration against dower. The decision appears to me to be right; but in the report of his judgment there is attributed to the Vice-Chancellor a *dictum* that if the dower had been barred by the will she would have been entitled to priority. With this *dictum* I find myself unable to agree: the statute makes no difference between the effect of a bar by deed and a bar by will—the bar by will is equally effective; and if the dower is barred, there is no ground for the application of the rule the foundation of which is the right to dower—alienation by the husband in his lifetime and alienation by his will are

(1) 3 Ch. D. 714.

CHITTY, J.
1892
In re GREENWOOD.
GREENWOOD v. GREENWOOD.

placed by the 4th section on identically the same footing. Suppose the husband's will consisted simply of an absolute disposition of his lands out of which his widow would have been entitled to dower her right to dower would be gone; and it would be strangely inconsistent to hold that where the will contained such a disposition of his lands, and also a gift of a legacy to the widow in satisfaction of dower, the latter gift had the effect of reviving the right to dower and making her a purchaser of the legacy.

It is argued that if the construction which I have put on the 12th section is adopted, the section is rendered inoperative. The answer to this objection appears to me to be this: first, the section takes the rule as it stood—it does not alter or enlarge it; and, secondly, there are cases to which it would still be applicable. If the husband had covenanted not to bar her dower, as provided for in sect. 11, and had in derogation of his covenant attempted to dispose of the lands by his will, the widow's right would not be barred; she would be put to her election by a legacy given in satisfaction of dower; and if she elected to take the legacy, she would be a purchaser of the legacy within the rule. There may be other cases to which the section would still apply. If a husband, being entitled to lands out of which his widow would be entitled to dower, makes a will giving her a legacy in satisfaction of dower, and then dies intestate as to his lands, it seems to me the section would apply: her dower would not be barred, and she would take the legacy as a purchaser.

I hold in this case that the annuity to the widow is not entitled to priority.

Solicitors: *Ridsdale & Son*, agents for *Sutcliffes, Hebden Bridge.*

G. M.

ROSENTHAL *v.* REYNOLDS.

NORTH, J.
1892
April 8.

[1892 R. 529.]

Trade-mark—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64 *sub-s.* 2, *s.* 74 *sub-s.* 2, *s.* 77—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *ss.* 10, 16—*Letters—Disclaimer.*

A corset manufacturer registered a trade-mark with initial letters added, disclaiming the right to the exclusive use of the added matter. He used those letters by themselves on a particular part of his corsets. A motion on his part to restrain a rival manufacturer from using the same initials on the same part of his corsets, as being calculated to deceive, was refused on the ground that the Plaintiff had disclaimed the right to the exclusive use of the initial letters.

THE Plaintiff in this action was *William Rosenthal*, trading as *William Rosenthal & Co.*, a corset manufacturer; the Defendants were *Waterhouse, Reynolds & Co.*, a firm of corset manufacturers. The Plaintiff claimed an injunction to restrain the Defendants from using the mark *W. R.* on corsets in such way as to lead to the belief that the Defendants' corsets were made by the Plaintiff, on the ground that the Plaintiff's goods, by reason of their being marked with the initials *W. R.*, were known in the market as *W. R.* corsets, and that some corsets manufactured by the Defendant firm had been marked with the letters *W. R.* in the same place (an unusual place for that purpose), and persons had bought such corsets as the corsets made by the Plaintiff. There was no allegation of any other resemblance in the get-up of the goods of the Defendants to the get-up of the goods of the Plaintiff. The Plaintiff had only used the letters *W. R.* on corsets for four or five years.

The Plaintiff had four registered trade-marks, consisting of labels with either fancy words or a device combined with letters in large roman type. One such mark, registered January, 1890, was "*Whalonia W. R.*" on a label; another, registered February, was a label with the device of an eagle and flowers, with the letters *W. R.* The Plaintiff had in each instance, in his application for registration, confined his claim to parts of the label,

NORTH, J. 1892 ROSENTHAL v. REYNOLDS.

which did not include the letters *W. R.*, and disclaimed "the exclusive use of the added matter."

Cozens-Hardy, Q.C., and *Sebastian*, for the motion :—

We base our application on the general equity that a person has no right, whether by the use of a get-up of an article that has a general similarity to some one else's get-up of a similar article, or otherwise—as in this case—by use of a peculiar mark in a peculiar manner, to pass his goods off as some one else's goods.

If, however, the Plaintiff is driven to rely on trade-mark, we say: Previously to trade-mark legislation a person by use would have acquired the right to a trade-mark in two letters even though he had always used them in combination with other marks: *Kinahan* v. *Bolton* (1). The Act of 1883, s. 77, takes away the right to sue in respect of an unregistered trade-mark, but only if it is one capable of registration; letters, without more, are not capable of registration under sect. 64 of the Acts of 1883–8; there is, therefore, nothing to prevent the Plaintiff suing on this mark if it be considered a trade-mark.

Moulton, Q.C., and *Swinfen Eady*, for the Defendants :—

There are only two ways in which the Plaintiff's case can be put: his relief must be founded on a similarity of get-up that is calculated to deceive, or on trade-mark. No general similarity is alleged. The Act, on a fair interpretation of it, prevents the acquisition of a trade-mark without registration. But if it did not, the Plaintiff has expressly disclaimed the exclusive right to use the two letters he now seeks to have as a trade-mark. That is nothing but a right of exclusive user. He is out of Court on that ground alone.

Cozens-Hardy, in reply :—

The Plaintiff is not claiming the exclusive right to use the letters; all he seeks is to restrain the use of them in a particular way that is shewn to be likely to deceive.

NORTH, J. :—

There is one ground which, I think, is in itself sufficient to

(1) 15 Ir. Ch. Rep. 75.

prevent my granting an injunction now, namely, that the Plaintiff in registering his trade-marks has expressly disclaimed the exclusive right to use the two letters. After his having deliberately made that disclaimer, I think he is not entitled to the injunction.

Solicitor for Plaintiff: *W. Morley.*
Solicitors for Defendants: *Field, Roscoe & Co.*

D. P.

MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY *v.* RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY.

[1891 M. 3282.]

Land out of Jurisdiction—Mortgage—Receiver.

A company incorporated by an American State, and domiciled in the *United States*, created an equitable charge on land in *Mexico* for payment of a debenture debt. The land became vested in an English company subject to an express obligation by them to pay off such charge out of the proceeds of sale of the property:—

Held, on motion for a receiver of the rents and other money to arise from the land, that the English company and its directors were accountable in an English Court to the debenture-holders for proceeds of such land come to their hands; but, under the circumstances, the Court being of opinion that a receiver would be useless, the motion was refused.

THIS was an action by holders of 125 debentures, issued by the *International Company of Mexico*, a company incorporated by the Legislature of the State of *Connecticut*, and domiciled in the *United States*, on behalf of themselves and other holders of such debentures. The object of the action was to enforce an equitable charge on land situated in *Mexico*. The debentures were issued in pursuance of a debenture trust deed, dated the 10th of March, 1888, made between the *International Company of Mexico* of the first part; the *River Plate Trust, Loan, and Agency Company, Limited* (an English company), of the second part, as trustees of the deed; and three individuals, as a committee for the protection of interested debenture-holders, of the third part. The

NORTH, J.

1892

MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY v. RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY.

Defendants to the action were the *River Plate Trust, Loan, and Agency Company*, the present members of the committee, the *International Company of Mexico*, and the *Mexican Land and Colonization Company, Limited*. The last-named company was an English company to whom the real estate in *Mexico*, which had been charged with the debenture debt, had been transferred with notice of, and expressly subject to the payment of, this equitable charge, and in whom (according to the evidence before the Court) the land was now vested in accordance with Mexican law. Leave had been given to serve the *International Company of Mexico* with notice of the writ in this action.

The *International Company of Mexico* is hereafter called the *American Company*; the *Mexican Land and Colonization Company*, the *English Company*; and the *River Plate Trust, Loan, and Agency Company*, the *Trustee Company*.

In the year 1885 the *American Company* was incorporated by a charter of the State of *Connecticut* in the *United States*; its objects were to acquire and work certain property in *Mexico*, held under certain concessions, and they had power to borrow money in respect of it. The property comprised in some of those concessions was a tract of country in *Lower California* consisting of about 17,500,000 acres. In June, 1887, they proceeded to raise a charge upon the property in *Lower California* by the issue of bonds; but the scheme for such charge was abandoned; and in March, 1888, there were only a small number of bonds outstanding that had been thus issued, which constituted a paramount charge upon the property: but which it was then intended to get in.

On the 2nd of March, 1888, a debenture prospectus was issued by the *Trustee Company*, as agents for the *American Company*, inviting subscriptions for debentures to the amount of $3,000,000 in 6000 debentures of $500 each, part of an intended issue of $5,000,000, to be secured on the land in *Lower California*; and on the 10th of March a deed was executed, for the purpose of giving security for the money thus borrowed, between the *American Company*, of the first part; the *Trustee Company*, of the second part; and Mr. *Morris*, Mr. *Denny*, and Mr. *Todd*, the Defendant committee, of the third part. The deed recited,

among other things, that the *American Company* had given a power of attorney to the committee to constitute a special hypothecation of the lands in question. By the witnessing part of the deed, the *American Company* covenanted with the *Trustee Company* that the lands in question should stand and be charged with the payment of the principal moneys and interest payable according to the tenor of the new debentures, and that such principal moneys and interest should be a first charge on the premises, subject only to the deed dated the 1st of June, 1887, for securing the paramount debentures. It was provided that the company would duly pay the principal and interest on the new debentures, and would pay over to the committee certain sums to provide for the paramount debentures, and would not issue any more of those paramount debentures. It then provided that if, for any reason, the committee should at any time in their uncontrolled discretion consider it necessary for the protection of the debenture-holders, it should be lawful for the committee, in pursuance of a resolution passed by or with the consent of a majority of them, to request the trustee to register in *Mexico* the hypothecation to be given by the *American Company* to the *Trustee Company* of lands in *Lower California*, and for the committee, under the power of attorney, to do all acts that were necessary to procure the hypothecation; and that the *Trustee Company* should procure the hypothecation to be registered in *Mexico*. It was provided that the *Trustee Company* should stand possessed of that deed and of the hypothecation thereby agreed to be given subject to and in trust to secure the principal moneys and interest on the paramount debentures, and, subject thereto, to secure the new debentures. The 8th clause provided that the *Trustee Company* and the committee should until the company should make some default in payment of principal or interest moneys secured by any of the debentures, or commit a breach of some covenant, provision, or condition therein contained, or until some steps should be threatened or taken to wind up or dissolve the company, permit and suffer the company to make arrangements from time to time for the sale of the lands or any of them, and to sell them in such way as they should think fit, subject to certain provisions as to the extent to which they

NORTH, J.
1892
MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY v. RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY.

should go in any one year. It then provided that the consideration should be a money consideration; that the *Trustee Company* was not to take any part in the sales until after the hypothecation had been registered, but afterwards was to concur in the sales. It was also provided that the *Trustee Company* should keep accounts of all the moneys it received and paid, and send such accounts to the committee twice in every year; and should also, at the same time, remit to the committee a portion of the money, which should be equal in gold to half the amount which by the accounts should appear to be the net proceeds of the sales. The 13th clause of the deed provided that, after any such default or any such breach, or the threatening or taking of any such steps, and in the case of a breach, notwithstanding waiver of any prior breach, the committee might, in the discretion of the committee, or upon the request in writing of the holders of half the debentures for the time being outstanding, require the *Trustee Company* to enter upon and take possession of the lands then remaining unsold, with full power to sell. There were certain provisions as to the application of the money from such sales. By the 20th article, the *American Company* covenanted with the *Trustee Company*, and as a separate covenant with the individual members of the committee, "That the principal moneys and interest secured by the debentures shall be a first charge upon the said lands, subject only to the debentures for the time being outstanding of the first series as aforesaid, and that it has full power to constitute the said hypothecation, and give the powers of attorney," and there was a provision, in the nature of a covenant, for further assurance. By the 32nd clause of the deed, the *American Company* agreed "that the High Court of Justice in *England* may administer the trusts of these presents, or adjudicate upon any question arising between the parties hereto in respect of any matter or thing herein contained."

The *English Company* was registered on the 3rd of May, 1889, by the name of the *Mexican Land and Colonization Company Limited*, with (among other defined objects) the object of acquiring the whole of the property and undertaking of the *American Company*. On the following day a document called a "Treaty on Conversion into an *English Company*" was executed

by the two companies in *London*, whereby the *American Company* agreed to transfer and sell, and the *English Company* to purchase and accept, the property in question, subject to the mortgage, lien, or charge existing thereon to secure the outstanding debentures referred to in the deed of the 10th of March, 1888: and the consideration for the transfer was expressed to be (*inter alia*) the undertaking by the *English Company* of the liability of the *American Company* to pay those debentures with interest: which the *English Company* undertook to do, and to indemnify the *American Company* against payment thereof.

On the 11th of May a document called the "Notarial Act of transfer of Assets in *Mexico*" was executed in *London* by the agents of the two companies. It stated that the *English Company* had been formed to take over all the property and liabilities of the *American Company*, and to carry on its business. It then proceeded to transfer all such property (including the property in question) to the *English Company*, which accepted the same, "subject, however, to the mortgage, lien, or charge now existing" upon the property in *Lower California* to secure the debentures or bonds referred to in the deed of the 10th of March, 1888: and it referred to the price or consideration for the transfer or cession as being (*inter alia*) the undertaking by the *English Company* of all the liability of the *American Company* to pay the same debentures and interest, and all obligations, debts, and liabilities and engagements properly incurred by or existing against the *American Company*. This transfer was sanctioned by the Mexican Government; and was completed by registration in *Mexico*.

There was evidence that, according to the law of *Mexico*, hypothecation of immoveable property, in order to have any effect, required registration, and that no valid hypothecation capable of registration had been effected in favour of the debenture-holders.

The Plaintiff company were the holders of 125 $500 debentures, secured by the deed of the 10th of March, 1888. In May, 1889, the *English Company* paid the half-yearly interest due on the debentures on the 1st of July, 1889. After that steps were taken to get the debenture-holders to exchange their

NORTH, J.
1892
MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY v. RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY.

debentures for preference shares in the *English Company*. For that purpose proceedings were taken to enable the *English Company* to issue preference shares in exchange for debentures, and at a meeting of debenture-holders, convened by the committee in manner provided by the debenture trust deed, at which the necessary majority of debenture-holders were present or represented, it was resolved that the rights of the debenture-holders of the *American Company* should be compromised by their accepting in lieu of such debentures, and the unpaid coupons, and in discharge of all rights, fully paid 6 per cent. cumulative preference shares of the *English Company* at a certain rate. Most of the debenture-holders came into the arrangement, and accepted preference shares in the *English Company* in exchange for their debentures. The Plaintiffs and others, holding in all 640, about one-tenth, of all the debentures issued, did not. The dividends on the outstanding debentures, due on the 1st of July, 1890, not having been paid in that month, the Plaintiff company commenced an action against the *American Company* in the Queen's Bench Division for the half-year's interest on the Plaintiffs' debentures, due the 1st of July, 1890.

The Defendants in the action delivered a defence, and counterclaimed that the Plaintiff company was bound by the resolutions of debenture-holders, passed in October, 1889, and that consequently their only right in respect of the debentures was to have preference shares in the *Mexican Land and Colonization Company* allotted to them.

On the 4th of February, 1891, Mr. Justice *Day* gave judgment in favour of the Defendants in the action and on their counterclaim. The Plaintiffs appealed; and on the 3rd of July, 1891, the Court of Appeal reversed that decision, and adjudged to the Plaintiffs £399 15*s*., the amount of interest claimed and costs, and dismissed the counter-claim: but nothing was recovered on that judgment.

The writ in this action was issued on the 4th of November, 1891. The Plaintiffs claimed a declaration that, by virtue of the provisions of the deed of March, 1888, the Plaintiffs and other holders of debentures which were a charge under that deed, were entitled to a first charge on the land and property com-

prised in the said indenture, subject only to the provisions of the indenture of the 1st day of June, 1887, and were entitled to have all acts (if any) done which were necessary to make such charge effectual against such land and property; an account taken of what was due to the holders of existing debentures; to have the trusts of the deed of the 10th of March, 1888, carried into execution, and the land and property realized; and then to have a declaration that the committee and the trustees were guilty of wilful neglect and default in having failed to procure and cause to be registered the hypothecation of the lands in question, in pursuance of the deed of March 10, 1888; and an inquiry what loss had been sustained therefrom.

A motion was now made on the part of the Plaintiff company, on notice served on the Defendants within the jurisdiction, for an order that a receiver should be appointed to get in and receive the rents and profits, and proceeds of sale of and other the moneys arising from the land in *Lower California* by the indenture of the 10th day of March, 1888, charged with the payment of the debentures in question, and to get in and receive the shares and moneys issued or paid, or to be issued or paid, by certain named companies carrying on business in *Mexico* to the Defendants, the *English Company*, as the consideration for the sale by the latter company to the said companies of lands forming parts of the said lands, and of rights and concessions existing over other parts thereof, and the certificates of such shares respectively, and to receive a specified sum of money (not asked for at the hearing of the motion) and consequential directions.

There was evidence that the *English Company* had transferred part of the property taken over from the *American Company* to the companies mentioned in the notice of motion other than the *Lower California Development Company*, but that none of such property was subject to the debenture trust deed under which the Plaintiffs claimed; that the *English Company* had transferred (*inter alia*) land subject to the debenture trust deed to the *Lower California Development Company*, and received as purchase-money £75,000, the whole of which had been expended in developing and preserving the land in *Lower California*, and that according to Mexican law, the money so expended was

NORTH, J.
1892
MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY v. RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY.

charged in priority to all other charges on such land; and there was evidence that satisfied the Judge that the appointment of a receiver of the property in *Mexico* would be useless.

Cozens-Hardy, Q.C., and *Vernon R. Smith*, for the Plaintiffs:—

Where the parties are in *England* the Court will entertain jurisdiction *in personam* to compel a person who has contracted in respect of land out of the jurisdiction to fulfil his contract. Here land in a foreign country has got into the hands of an English corporation charged with the Plaintiffs' debentures. The Defendant corporation having full notice of the charge, the Court will therefore appoint a receiver, and order the Defendants to assist the receiver: *Penn* v. *Lord Baltimore* (1).

Sir *H. Davey*, Q.C., and *Kirby*, for the *Mexican Land and Colonization Company*:—

The whole jurisdiction in respect of real estate situate abroad, and the proceeds of it, is founded on contract; an order in respect of such subject-matter can only be made against a person who has contracted, expressly or by implication, to be bound by the Courts in this country. There being no privity of contract between the Plaintiffs and the *Mexican Land and Colonization Company*, there is no jurisdiction to appoint a receiver: *Norris* v. *Chambres* (2); *Norton* v. *Florence Land and Public Works Company* (3); *Waterhouse* v. *Stansfield* (4); *Whitaker* v. *Forbes* (5); *London and South Western Railway Company* v. *Gomm* (6); *Martin* v. *Martin* (7). If in any case a receiver could be appointed, this is not a proper case for the exercise of jurisdiction. To appoint a receiver to act in *Lower California* would be useless, and for such receiver to attempt to act in that country would be mischievous. In this country there is nothing to receive.

Cozens-Hardy, in reply:—

On the principle that the Court will act on the conscience of

(1) 1 Ves. Sen. 444.
(2) 29 Beav. 246; 3 D. F. & J. 583.
(3) 7 Ch. D. 332.
(4) 9 Hare, 234.
(5) 1 C. P. D. 51.
(6) 20 Ch. D. 562.
(7) 2 Russ. & My. 507.

the owner of the land, we ask for an order *in personam*. The jurisdiction is not founded merely on contract, but on the principle that the Court will compel a person over whom it has jurisdiction to do what is right and equitable: *Lord Cranstown* v. *Johnston* (1); *Ex parte Pollard* (2); *Ex parte Holthausen* (3); *Paget* v. *Ede* (4); *Norris* v. *Chambres* (5).

W. F. Hamilton, for the *Trustee Company* and the committee.

April 12. NORTH, J. (after stating the facts and the nature of the action):—

Now, the answer of the *English Company*, the only Defendants who appear, is one taking very high ground indeed. They say that they are not under any obligation to anybody; the land is theirs: they are the owners of it, and there is no case for relief against them in this action: and it is said that such remedy as the debenture-holders have is against the land in *Mexico*, and must be enforced in *Mexico*, if anywhere, and not here. The result is this: it is said that the English debenture-holders are to go to *Mexico* and sue in the Mexican Courts an English company domiciled in *London*, and carrying on business here; and these English Plaintiffs are to sue those English Defendants in *Mexico*, not in respect of the ownership of land in *Mexico*, but with respect to the application by the *English Company* of the proceeds of the land in *Mexico* which has been sold by the *English Company* under such circumstances as clearly to give a good title to the land in *Mexico* to any person to whom they sold it. Further, it appears that, if the parties were to do what it is suggested they should do, namely, sue in *Mexico*, they would be met by the conclusive answer, according to Mexican law, that they can have no charge on the land in *Mexico* at all, because there is no registration, and registration is necessary for such a claim. So much for the allegation that they can, and ought to, sue in *Mexico*.

Then it is said that there is no remedy here because there is no contract or privity of any sort subsisting between the debenture-

(1) 3 Ves. 170.
(2) Mont. & Ch. 239.
(3) Law Rep. 9 Ch. 722.
(4) Ibid. 18 Eq. 118.
(5) 29 Beav. 246, 256.

NORTH, J.
1892
MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY v. RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY.

holders of the *American Company* and the English owners of this property and its proceeds. The English company put their case as high as this—it is only fair to them to say it is putting it so high that it would be a justification for much more than they have actually done, but it is put as high as this: they say there is no remedy whatever against them; they can deal with the property as they please; they are entirely irresponsible in respect of the proceeds of the lands charged by these debentures, and they can do what they like with such proceeds. I must say that, if we do find that Englishmen have chosen to hand over good English money to an American company for the exploitation of a province in *Mexico*, one cannot feel very great sympathy with such persons if they do not see much of their money again; but, in my opinion, they are not so entirely outside the pale of the law that they cannot receive any assistance from the Court in a case of this sort. Several cases were referred to with regard to the position of the parties where a remedy is sought against land abroad; but we have to consider here not merely the remedy against land abroad, but the remedy against Defendants who are here, and who are sued here.

There is only one case I need refer to on this subject, and that is the case of *Lord Cranstown* v. *Johnston* (1), the facts of which, stating them very shortly, but sufficiently for this purpose, are as follows: There were earlier proceedings between the plaintiff and the defendant, under which an arbitration was agreed to, and the result of that arbitration was an award under which the plaintiff was to pay to the defendant a sum of about £2500. The plaintiff did not pay at the time fixed by the award. He was entitled, amongst other property, to certain property in the island of *St. Christopher*. The plaintiff offered to pay the defendant, and requested him to come to an account; but that was not done; and the defendant commenced an action in the Courts of King's Bench and Common Pleas in the island, and obtained judgment and execution, and thereupon he proceeded to put up the property of the plaintiff in that island for sale, and he bought it himself, and the property was conveyed to him. Considerable correspondence took place

(1) 3 Ves. 170.

between the parties, and there was a suit for the purpose of getting behind that transaction in the island and establishing the right of the plaintiff in the action to recover his land notwithstanding the sale in *St. Christopher* upon payment of what was found to be really due from him to the defendant upon taking an account. The most material part of the case to be remembered is this, that what he had done was strictly legal according to the law of the island; which did authorize a sale of the property and the acquisition of it by the defendant on those terms. Then the Master of the Rolls, in giving judgment in the case (it was Lord *Alvanley*, in 1796, I think), said this (1): "It is said, this Court has no jurisdiction, because it is a proceeding in the *West Indies*. It has been argued very sensibly, that it is strange for this Court to say, it is void by the laws of the island or for want of notice. I admit, I am bound to say, that according to those laws a creditor may do this. To that law he has had recourse, and wishes to avail himself of it: the question is, whether an English Court will permit such an use to be made of the law of that island or any other country. It is sold, not to satisfy the debt, but in order to get the estate, which the law of that country never could intend, for a price much inadequate to the real value, and to pay himself more than the debt, for which the suit was commenced, and for which only the sale could be holden. It was not much litigated, that the Courts of Equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country, as upon lands here. Bills are often filed upon mortgages in the *West Indies*. The only distinction is, that this Court cannot act upon the land directly, but acts upon the conscience of the person living here." He then refers to two or three cases, and says: "Those cases clearly shew, that with regard to any contract made, or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in *England*. Lord *Hardwicke* lays down the same doctrine (2). Therefore, without affecting the jurisdiction of the Courts there, or questioning the regularity of the proceedings as in a Court of law, or saying that

(1) 3 Ves. 182.

(2) 3 Atk. 589.

NORTH, J.
1892
MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY v. RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY.

this sale would have been set aside either in law or in equity there, I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage he got by the nature of those laws to proceed behind the back of the debtor upon a constructive notice, which could not operate to the only point, to which a constructive notice ought, that there might be actual notice without wilful default: that he has gained an advantage which neither the law of this nor of any other country would permit. I will lay down the rule as broad as this: this Court will not permit him to avail himself of the law of any other country to do what would be gross injustice. It is said, what if the sale had been to a third person? I am glad I have not to determine that." Then, further on he says: "I have no scruple to say in this case, it would be unconscionable to permit the defendant to avail himself of the laws of this island to procure this estate for any other purpose than to pay him his own debt." Applying that to the present case, I say it would be most unconscionable to allow the Defendants here, who have registered their assignment in *Mexico* subject to the obligations created in favour of the Plaintiffs, who have obtained the land at a consideration measured to some extent by the existence of those obligations and the taking by the *English Company* upon themselves of the burden of satisfying those obligations; in my opinion it would be as unconscionable as anything could be to say that now, because they had registered their transfer before the hypothecation of the Plaintiffs had been registered, they are at liberty to set the Plaintiffs at defiance altogether. It was said that the case I have cited went upon fraud. Such a fraud as there was in that case I think would equally exist in the present case if the *English Company* were attempting to do what their counsel claims for them a right to do. I am not going to appoint a receiver for reasons I will mention directly; but I do think it is extremely important that the *English Company* and its directors should not go out of this Court with any idea that they stand in a position so entirely outside and above the law that they can do what it is claimed it is their right to do with impunity or without responsibility. It is right that they should know that in my opinion they clearly would be liable if they

misapplied the proceeds of this land without making due provision for the Plaintiffs' claims; and, in my opinion, they could be restrained by this Court from so applying any part of the proceeds of the land which ought to go to satisfy those claims; and, what is more, I think that the company, and every officer who took part in such proceedings, would be personally responsible to the Court in respect of any such misapplication of the funds which might be made. But in the present case I have said that I am not going to appoint a receiver, and, therefore, it is not necessary to consider that matter further, nor to refer to the other cases going the same way; and further, it is not necessary to consider another point which might be considered, namely, whether under the doctrine of *Prettyman's Case* (1), as explained by *Smith* v. *Widlake* (2), there is not another ground on which the Defendants might be held responsible here for any misapplication of the money. I have said I am not going to appoint a receiver at this stage of the action, and I say so for two reasons: in the first place, looking at the deed of the 10th of March, 1888, supposing that the hypothecation had been registered in *Mexico*, which is putting it at the highest that the Plaintiffs could put it at, the Plaintiffs then would not be entitled to a receiver under the provisions of that deed, because I find that under the 13th of the articles, it is provided that after default in payment of what is due on the debentures or on breach of the conditions, the committee may, in the discretion of the committee or "upon the request in writing of the holders of half the debentures for the time being outstanding, but in either case without any further consent of the company or its assigns, require the trustee by itself or its agents to enter upon and take possession of the lands." The matter, therefore, is left in the discretion of the committee. They have not thought fit to take that step, and they have not been put into motion by a request in writing of the holders of half the debentures for the time being outstanding; and, therefore, as the Plaintiffs would not be entitled of their own motion to have a receiver appointed when everything had been carried out as contemplated by the deed,

(1) Cited 2 Vern. 279. (2) 3 C. P. D. 10.

NORTH, J. 1892 MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY v. RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY.

they are not in a better position by reason of the steps that were contemplated not having been taken. To put it shortly, the committee can, no doubt, under certain circumstances, require the trustee to enter into possession; but as that has not been done, I do not see how I can give the Plaintiffs leave themselves to enter into possession. The second ground is one of a different nature. The affidavits of the Defendants set up a case of this kind. They say that the nature of the property and the requirements, pecuniary and otherwise, that were necessary to work and develop it were of such a character that it would be absolutely impossible to find any one in this country to undertake the duties and responsibilities of management, and that if it were attempted to do so, it would, to put it shortly, sink the ship, and there would be nothing forthcoming for anybody. I take the same view as they do with regard to that; but that is going farther than is necessary for the purposes of the notice of motion, because the notice of motion does not ask to appoint a manager, which I think clearly I could not do, but it asks for a receiver to a limited extent. With respect to that we must turn to the notice of motion. It asks for an order that a well-known chartered accountant in *London*, or some other fit and proper person, be appointed to receive the rents and profits and proceeds of sale of, and other moneys arising from, the 17,500,000 (or thereabouts) acres of land in *Lower California* in question.

Now, as to rents and profits it is said there are none, and the nature of the property is such that I see no reason for hesitating to accept that statement. It would be idle, therefore, to appoint a receiver of rents and profits if there is nothing he can receive. I pass over for the moment the point as to the proceeds of sale. Then it goes on to ask that the receiver may get in and receive the shares and moneys issued or paid, or to be issued or paid, by the *Lower California Development Company, Limited*, and half-a-dozen other companies mentioned in the notice of motion. As regards those other companies, I could not interfere; for it has been stated on behalf of the Defendants, and there is no contradiction of it, that no part of the property sold to them and in respect of which consideration has been received

from them by the *English Company*, is in any way property subject to these debentures, and I must accept that statement for present purposes. I could not after that appoint a receiver of anything coming from those companies. As to the *Lower California Development Company*, the matter stands rather differently, because it is admitted that some of the property subject to the debentures has been sold to them, and they have paid the large sum of £75,000 in cash, and a large amount in shares of the company of which it is said that a receiver might be appointed. I do not see how it can be done, for the evidence states positively that that money has all been spent, and that the certificates of shares have all been pledged by way of mortgage to secure moneys which have been raised and applied upon the property. The nature of the property as stated in the affidavits makes it extremely probable that that is so; and therefore it is impossible to appoint a receiver usefully of money that has been spent, or of shares that are at the present moment mortgaged to persons who cannot in any way be interfered with. Then a receiver is also asked—I am going back now—with respect to the proceeds of sale that may arise from other dealings by the company with its lands. With regard to that, I do not see anything tangible with respect to which a receiver can be appointed. It is not stated that any other sales are in contemplation, though I think they probably are—at least, they probably would be if opportunity offered; but I do not see how a receiver who knows nothing about any such sales could possibly intervene or receive any money payable in respect of them; and when I find there are such difficulties in the way of a receiver doing anything when he is appointed, and when I know also that the company and the directors can be made responsible for any misapplication of such moneys, I do not see how I can usefully appoint any receiver in those respects.

The only other thing asked for by the notice of motion was a receiver of a particular sum mentioned in the notice. That part of the case Mr. *Hardy* did not open. The result is, therefore, that I am unable, for the reasons I have mentioned, to appoint any receiver upon this interlocutory motion; but, looking at the

NORTH, J.
1892
MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY v. RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY.

whole case, I think it is one in which I can properly say that the costs of both parties must be costs in the action.

Solicitors for Plaintiffs: *Badham & Williams.*

Solicitors for the *Mexican Land and Colonization Company*: *Norton, Rose, Norton & Co.*

Solicitors for the other Defendants within the jurisdiction: *Ashurst Morris, Crisp, & Co.*

D. P.

NORTH, J.
1892
April 12.

In re ORMROD'S SETTLED ESTATE.

[1891 O. 986.]

Settled Land—Application of Capital Money—Expense of "Improvements"—Costs of Parliamentary Opposition—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 26, 36—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 15.

An estate was settled by the will of a testator, his widow being the first, and his nephew the second tenant for life. During the lifetime of the widow she expended out of her own moneys various sums in making improvements upon the estate. Some of these sums were expended before, and some after the commencement of the *Settled Land Act*, 1882. With regard to those which were expended after the commencement of the Act, no scheme was, prior to the execution of the works, submitted for approval, either to the trustees of the settlement or to the Court, in accordance with sect. 26 of the Act. The widow also, prior to the commencement of the Act, paid out of her own moneys the costs of the successful opposition of the trustees to some bills in Parliament, which contained provisions injuriously affecting the estate. The repayment to the widow of all the sums thus expended by her was secured by four bonds given to her by the nephew. After the death of the widow the nephew, being then tenant for life in possession of the estate, applied to the Court for a direction to the trustees to apply capital money in their hands in payment of the amounts due upon the bonds:—

Held, that, independently of sect. 36 of the *Settled Land Act*, 1882, the Court, under its general jurisdiction, had power to direct the payment of the costs of the Parliamentary opposition out of the capital money, and payment was directed accordingly:

Held, that, as regarded the cost of improvements executed since the commencement of the Act of 1882, sect. 15 of the *Settled Land Act*, 1890, was retrospective in its operation, and enabled the Court to direct payment out of the capital money:

But *held*, that, as regarded the cost of improvements executed before

the commencement of the Act of 1882, even if sect. 15 was retrospective (as to which, *quære*), the Court had a discretion; and there was no reason why the tenant for life should be repaid out of capital sums which he had deliberately expended in improving the estate at a time when he knew that (as the law then stood) the capital was not applicable for such purposes.

ORIGINATING SUMMONS by the tenant for life in possession under the settlement created by the will of *Peter Ormrod*, deceased, of an estate called the *Wyresdale* estate, asking that the trustees of the settlement for the purposes of the *Settled Land Acts* might be directed to apply a sum of £7574 1*s.* 9*d.* Consols, standing in their names, and representing the investments of capital moneys arising under the *Settled Land Acts* in their hands subject to the settlement, towards payment to the Applicant of the amount of the principal moneys owing upon four several bonds given by the Applicant to *Eliza Ormrod*, deceased, the late tenant for life of the estate, to secure sums amounting in the whole to £8501 10*s.* 8*d.*, expended in improvements executed upon the estate during her life.

Peter Ormrod, the testator, by his will dated the 11th of November, 1871, devised the estate to *James Ormrod*, *William Gray*, and *William Hargreaves*, and their heirs, to certain uses and upon certain trusts therein mentioned, and subject thereto upon trust during the widowhood of the testator's wife, *Eliza Ormrod*, for her and her assigns. And the testator declared that the trustees or trustee for the time being of his will should, during the continuance of the trusts aforesaid, manage and superintend the estate, with power to cut timber and underwood for repairs or sale, or otherwise, and to erect, pull down, and repair buildings, and insure buildings and other property against loss or damage by fire, and to drain and make other improvements, and to preserve game, and to accept surrenders from, and make allowances to and arrangements with, tenants and other persons, and with all other powers expedient for the due management and superintendence of his said estate. And the testator declared that, from and after the death or marriage again of his wife, his said estate should go and remain to the use of his nephew *James Cross Ormrod* for his life, without impeachment of waste; with limitations over in strict settlement, by virtue of which at

NORTH, J. 1892 *In re* ORMROD'S SETTLED ESTATE.

the date of the issue of the summons *Peter Ormrod* (eldest son of *James Cross Ormrod*), was the first tenant for life in remainder, with remainders to his children, he having none; *James Reginald Ormrod* (second son of *James Cross Ormrod*), an infant, was the second tenant for life in remainder, with remainders to his children, he having none; and *Ernest Percival Ormrod* (third son of *James Cross Ormrod*), an infant, was the first tenant in tail in remainder.

The testator died on the 17th of May, 1875. His widow, *Eliza Ormrod*, did not marry again, and she died on the 1st of July, 1890, and thereupon *James Cross Ormrod* became under the limitations of the will tenant for life in possession of the estate.

While the widow was in possession and occupation of the estate, she, by arrangement with the present tenant for life, expended out of her own moneys various sums in making improvements of a permanent nature on the estate. Some of these sums were expended before the 1st of January, 1883 (that being the date of the commencement of the *Settled Land Act*, 1882), and some after. In the case of those which were expended in the year 1883 and afterwards, no scheme was, prior to the execution of the improvements, submitted for approval either to the trustees of the settlement or to the Court, as provided by sect. 26, sub-s. 1, of the *Settled Land Act*, 1882.

The widow also in the years 1876, 1878, and 1879, paid out of her own moneys the costs occasioned by the opposition of the trustees to some bills which were promoted in Parliament by a water company and by the Corporation of *Manchester*, and which contained provisions injuriously affecting the estate. The opposition resulted in the insertion of clauses for the protection of the estate. The actual payments were made out of the widow's income, and in the view taken by the Court they were not made by the trustees under their powers of management, but in effect as payments by the widow.

The repayment of the amounts thus expended by the widow both for improvements and in costs, was secured by four bonds, dated respectively, the 19th of September, 1879, the 21st of March, 1883, the 27th of August, 1885, and the 23rd of

November, 1888, and respectively conditioned for the repayment of the respective sums of £3772 0*s.* 7*d.*, £1164 19*s.* 9*d.*, £1110 11*s.* 10*d.*, and £2453 18*s.* 6*d.*, by *James Cross Ormrod*, to the widow during her life, or to her executors or administrators within six months after her death, but without interest in the meantime.

The Plaintiff on the summons was *James Cross Ormrod*; the Defendants were *Peter Ormrod*, *James Reginald Ormrod*, and *Ernest Percival Ormrod*; the trustees of the settlement; and the executor of the widow.

Cozens-Hardy, Q.C., and *A. Bailey*, for the tenant for life:—

The sums expended for the costs of parliamentary opposition were clearly expended for the protection of the estate, and the Court has power under sect. 36 of the *Settled Land Act*, 1882 (1) to direct them to be paid out of capital moneys, notwithstanding the fact that the money was expended before the passing of the Act. The words of sect. 36 are "proceedings taken or proposed to be taken," and "costs . . . incurred or to be incurred." This section will be liberally construed: *In re Earl of Aylesford's Settled Estates* (2); and indeed, independently of the Act, the Court would under its general jurisdiction have power to order these costs to be paid: *In re Earl De La Warr's Estates* (3).

(1) By the *Settled Land Act*, 1882, s. 26, sub-s. 1: "Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, shewing the proposed expenditure thereon."

By s. 36: "The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement."

By the *Settled Land Act*, 1890, s. 15: "The Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by the *Settled Land Acts*, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the Court."

(2) 32 Ch. D. 162.

(3) 16 Ch. D. 587.

NORTH, J.
1892
In re ORMROD'S SETTLED ESTATE.

As to the moneys expended in improvements, the Court could not, before the Act of 1890, have sanctioned the payment out of capital money, because no scheme was, before the execution of the improvements, submitted for approval to the trustees or to the Court, in accordance with sect. 26 of the Act of 1882. But sect. 15 of the Act of 1890 now enables the Court to authorize such an application of capital money, notwithstanding the omission to submit a scheme, and that section is retrospective in its operation, and extends to improvements executed before, as well as after, the Act of 1882 came into operation. The reference to improvements "authorized by" the Act of 1882, is only for the purpose of defining the nature of the improvements, and does not limit the operation of the section as to time.

[NORTH, J.:—Is not sect. 15 intended only to cure a defect arising from the omission to submit a scheme for approval? Does it apply to an improvement executed before the Act of 1882, when it would have been impossible to submit a scheme?]

At any rate, sect. 15 applies to all improvements executed between the coming into operation of the Act of 1882 and the passing of the Act of 1890.

Clearly Mrs. *Ormrod* did not intend to make a present of the expenditure to the estate, and the payments were not such as the trustees would have been justified in making under the trust for management.

Wace, for the two tenants for life in remainder, and the first tenant in tail in remainder:—

The words of the trust for management are very extensive, and are sufficient to cover all the expenditure, except possibly the costs of the parliamentary opposition. The true inference is that the money was expended by the trustees under this trust. Trustees will always be allowed costs properly incurred for the protection of the trust estate: *Bowes* v. *Strathmore* (1); *Bright* v. *North* (2). The application is, in substance, for the purpose of recouping the tenant for life that which he has already paid or agreed to pay. The Court will not allow this, unless the expenditure was a charge on the inheritance: *In re Leigh's Estate* (3).

(1) 8 Jur. 92. (2) 2 Ph. 216. (3) Law Rep. 6 Ch. 887.

Independently of the Act, there is no jurisdiction to allow this expenditure; and, if there is jurisdiction under the Act, the Court has a discretion, and under the circumstances of the case, the arrangement which has been made between the parties should not be disturbed: *In re Knatchbull's Settled Estate* (1). Sect. 15 of the Act of 1890 was intended only to remove the necessity of submitting a scheme before the execution of improvements, and it can, therefore, at any rate, apply only to improvements executed since the Act of 1882 came into operation. If it had been intended to refer to all improvements of such a nature as are authorized by the Act of 1882, the words used would have been "improvement of a kind authorized by" the Act of 1882, as in sect. 1 of the *Settled Land Act*, 1887 (50 & 51 Vict. c. 30). If sect. 15 has any retrospective effect, it must be limited to improvements executed since the Act of 1882 came into operation. If this be not the limit, there would be no limit at all; money expended on improvements by any tenant for life, however long ago, might now be repaid out of capital money.

F. L. Wright, for the trustees:—

In re Knatchbull's Settled Estate shews that sect. 15 of the Act of 1890 is not retrospective. *In re Earl De la Warr's Estates* (2) was decided under the general jurisdiction of the Court; *In re Twyford Abbey Settled Estates* (3). Sect. 36 is, in substance, a re-enactment of sect. 17 of the *Settled Estates Act*, 1877, and in construing it the Court will have regard to the fact that some of the costs of Parliamentary opposition were incurred before the Act of 1877 came into operation.

NORTH, J. (after stating the effect of the will, and other facts, continued):—

The outlay, before the commencement of the Act of 1882, was apparently (without going into details) for the benefit of the estate; and, subject to some particulars upon which I might comment if it were necessary, it may, as a whole, have been such as would have been allowed out of capital money, if it had been

(1) 27 Ch. D. 349; 29 Ch. D. 588. (2) 16 Ch. D. 587.
(3) 30 W. R. 268.

NORTH, J.
1892
In re ORMROD'S SETTLED ESTATE.

incurred after the Act of 1882 had come into operation, and a scheme had been submitted for the sanction of the Court or the trustees before the outlay was incurred; but there is an exception in respect of four items, representing the costs of opposition to three bills in Parliament, promoted by a water company or a corporation, and which proposed to interfere, to some extent, with the water supply to the estate. The way in which the payments were made was this: various sums were advanced from time to time out of the income of the estate. It is suggested that these sums were advanced by the trustees in exercise of their power of management of the estate, and that, therefore, they represent an outlay properly made out of the income before it became available for payment to the widow. I do not think that is the true view of the case. I think it is not quite consistent with the story told by the affidavits, and it is quite inconsistent with the acts of the parties at the time. When these advances were made the widow was upwards of seventy-six years of age; she was entitled to the income for her life, but, if she were to make what may be called "capital outlay" for improvements upon the estate out of her income, she would not, having regard to her age, be likely to see much benefit resulting from the expenditure, and she was apparently unwilling to incur so large an outlay as was considered desirable, and, therefore an arrangement was made between her and the next tenant for life, whose estate in possession probably did not then appear to be so far off as it afterwards turned out to be in fact, that the widow should find the money for the improvements—that they should be paid for out of her income—but that he should enter into a bond to secure the repayment to her estate after her death of the sums which she should so advance. He was not then tenant for life, and was not receiving the income; and it was agreed that the widow, who was the tenant for life in possession, should advance the money for the purpose, and should be repaid by him, without interest, at the time when he should enter into possession of the estate, and should himself become entitled to the income. Mr. *Wace* says that it does not appear that any such arrangement existed at the time when the earlier advances were made, because the first bond is dated in 1879, and the advances

commenced as far back as 1876. That is not really material. Whether the arrangement was made on the occasion of each advance, culminating ultimately in a bond, or whether it was not made until the bond was given, it was an arrangement which it was open to the parties to make whenever they chose to do so, and the time for acting upon it has now arrived.

Then it is said that the present application is not for the payment of the cost of the improvements out of capital money; but it is to recoup to a tenant for life payments which have already been made by her out of her income. I do not think that is an accurate view of what took place. The tenant for life in possession of the estate would not pay for these improvements on her own account out of her income; but she arranged with the next tenant for life that she would find the money for the purpose, if, when he should come into possession, he would refund to her the amount which she had advanced, without interest. It was, therefore, an arrangement between the present and the next coming tenant for life, just as if it had been made between the tenant for life in remainder and his banker, except that in that case there would have been some charge for interest on the advance. Now the cost of these improvements, which has been paid temporarily by a person who lent the money for the purpose, is to be provided for the first time out of the estate; and the question is, how is it to be paid? It must be paid either by the tenant for life, who has now come into possession, by reason of his contract with his banker, so to say, to pay it; or it must be paid out of the capital of the estate itself. I do not think, therefore, that it is an accurate way of describing the transaction to say that the application is to recoup something which the late tenant for life laid out. It is to recoup something which that tenant for life advanced only by way of loan.

Then the question is, whether the expenditure should now be authorized out of the capital of the estate. First, as regards the Parliamentary expenditure, it is obvious that it was incurred by the tenant for life, or forced upon the tenant for life, for the purpose of defending the estate. Independently of sect. 36 of the Act, I think the Court has power to say, not that the expenditure shall be a charge upon the estate, but that moneys forming

NORTH, J.
1892
In re ORMROD'S SETTLED ESTATE.

part of the settled estate, and subject to a trust to be laid out in the purchase of land, may be applied in repaying the estate of the late tenant for life the expenditure so incurred. Two or three cases have been referred to, and there are others bearing on the point. It is not necessary to fall back upon sect. 36 of the Act of 1882, which clearly, as Mr. *Wolstenholme* points out in his book on the Act, has given a power which did not previously exist, of providing for such expenses by mortgaging the settled estate itself, as distinguished from applying for the purpose trust moneys which are to be laid out in the purchase of land to be settled, which the Court had previously done.

Then comes the question of the expenditure on improvements. I do not propose to allow the expenditure which was incurred before the Act of 1882 took effect. I do not think that it is necessary to decide whether I have power to allow it, having regard to the provisions of sect. 15 of the Act of 1890. I am asked to read the words, "any improvement authorized by the *Settled Land Acts*, 1882 to 1890," in that section, as meaning "any improvement of the kind authorized" by those Acts. It may be that that section is confined to cases in which a scheme might have been submitted for approval, but was not;—that is, a case in which the expenditure could, by means of proper proceedings, have been authorized under the Act of 1882, because it was incurred after the commencement of that Act. I do not decide that point. I am willing for the present purpose to assume that sect. 15 has a larger retrospective operation. But, assuming that it has, I do not think it right that that expenditure should be now recouped out of capital money, for this reason—the expenditure was incurred at a time when it was impossible to make provision for its payment out of capital money, with the exception of course of the costs of the opposition to the bills in Parliament, which I have already dealt with. The other expenditure could not, at that time, be provided for out of capital, and, when it was incurred, it could only have been with the intention of paying for the improvements out of income, for the benefit of the estate. No doubt it was deliberately done with that sole object in view. The tenants for life having taken upon themselves deliberately, with their eyes open, the expenditure of this

money upon the estate, without any possibility, as the law then stood, of getting it back, I do not see why I should undo what was then done, simply because an Act has been since passed under which, if it had existed at the time, the improvements might have been made at the cost of the capital of the estate. I can see no reason for altering what was deliberately done in the present case. There might, possibly, be a case in which the tenant for life would have been embarrassed by the expenditure, and it might be expedient, in the interest of all parties, that repayment should be made to him of the expenses so incurred. It may be that sect. 15 gives power to do this. That section may be in that sense retrospective. But, in the present case, there is no reason why I should apply sect. 15 in that way, even if there is power to do so. The expenditure was all deliberately incurred at a time when there was no power to charge the estate with it, and I see no reason for altering the state of things thus established.

As regards the expenditure since the commencement of the Act, the matter stands quite differently. So far as I can judge from the evidence, this expenditure was all in respect of matters which could have been properly paid for as improvements under the Act of 1882, if a scheme had been previously submitted to the Court or to the trustees for the purpose. I propose to sanction all that has been done since the beginning of the year 1883, and to authorize the payment out of capital of the sums expended since that time for improvements: and also the costs of the Parliamentary opposition.

Solicitors: *Baileys, Shaw, & Gillett; Rowcliffes, Rawle, & Co.*

W. L. C.

NORTH, J.

1892

May 4, 5.

LOCK *v.* PEARCE.

[1891 L. 2856.]

Lease—Forfeiture—Breach of Covenant—Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1.

A notice under sect. 14, sub-sect. 1, of the *Conveyancing and Law of Property Act*, 1881, requiring the lessee to remedy a breach of covenant, may be good, though it does not require payment of compensation in money.

THE Plaintiffs were the owners as mortgagor and mortgagee of seven leasehold houses at *South Tottenham*, let to weekly tenants. The Defendant was the lessor of the premises.

On the 2nd of June, 1891, the Defendant, by his solicitors, served written notices on the Plaintiffs, by leaving them on the several houses, that, unless breaches of covenants in the houses were remedied within three months, the provisoes for re-entry contained in the leases of the respective houses would be enforced. The notices were in similar terms.

The following are the terms of such notices:—

"To *James William Lock*, of 19, *Booksellers' Row*, *Strand*, in the county of *London*; *Thomas Noton*, of 12, *Great Swan Alley*, in the city of *London*, or other the lessee or assignee of the premises No. 56, *Mansfield Road*, *South Tottenham*, in the county of *Middlesex*.

"As solicitors and agents for and on behalf of *Arthur Pearce*, of 8, *Giltspur Street*, in the city of *London*, gentleman, the freeholder of the premises hereinafter referred to, we hereby give you notice, that you have not well and sufficiently repaired, upheld supported, maintained, paved, purged, scoured, cleaned, emptied, amended, and kept the messuage, dwelling-house, and building known as No. 56, *Mansfield Road*, in the parish of *Tottenham*, in the county of *Middlesex*, with the appurtenances thereunto belonging, with all needful and with all necessary reparations, cleansing and amendments whatsoever, pursuant to the covenants on that behalf contained in the indenture of lease of the 16th day of July, 1880, and made between *Thomas Noton* of the one part and

James William Lock of the other part, under which you hold the same dwelling-house, messuage, premises, and buildings; and further, that you have not painted the external wood and iron-work of the said messuage, dwelling-house, and buildings, and all the interior parts thereof usually painted, pursuant to the like covenants in that behalf: Now, as such solicitors and agents as aforesaid, we hereby give you notice and require that you do, within three calendar months from the giving of this notice, remedy the breach of covenant committed by you as above mentioned, by doing and executing the work, repairs, cleansings, paintings, and amendments in and upon the same messuage, dwelling-house, and buildings which are set forth in the schedule hereunto annexed. And as such solicitors and agents as aforesaid we also require you to forthwith pay to the said *Arthur Pearce* the sum of £2 2*s.* for the expenses which have been incurred by the said *Arthur Pearce* for surveyor's fees and solicitor's charges by reason of such breach of covenants as aforesaid; and we hereby give you further notice, that if you make default in remedying such breach of covenants in manner above mentioned, or in making the compensation hereby required, the said *Arthur Pearce* will enter and take possession of the said messuage, dwelling-house, and premises, but without prejudice to any other remedies which he may have by reason of such default."

There was appended to the notices a schedule of work required to be done.

After the expiration of the three months from the date of the notice, the Defendant commenced proceedings in the *Edmonton* County Court for the recovery of the several houses against the tenants; and on the 25th of November, 1891, the county court Judge made orders on the tenants for delivery of possession to the Defendant. On the same day, the Plaintiffs took out this originating summons, asking a declaration that no forfeiture had taken place, or, in the alternative, relief against the Defendant's right of re-entry and forfeiture, upon such terms as the Court should think fit, and for an injunction to restrain the Defendant from proceeding on his judgments in the county court to take possession. The summons was returnable for the 10th of December. On the 27th of November the Plaintiffs, by special leave, served

NORTH, J.
1892
LOCK
v.
PEARCE.

on the Defendant with the summons notice of motion for an interlocutory injunction to restrain his proceeding to obtain possession for the 4th of December, 1891. Counsel had not an opportunity to bring on the motion on that day. On the 9th of December the Defendant obtained possession of the houses under the county court judgments. The motion was ordered to come on with the summons which was adjourned into Court. The summons and motion were now heard.

Oswald, for the Plaintiffs :—

No forfeiture occurred at all, and the lessee and his mortgagee are entitled to be let into possession again, because the notices on which the county court actions were founded were bad. They were bad in that they did not comply with the provisions of sect. 14, sub-sect. 1, of the *Conveyancing and Law of Property Act*, 1881, in requiring compensation in money to be made. These notices required an illegal compensation to be paid. They required two guineas each for solicitor's and surveyor's fees which the lessor had no right to: *Skinners' Company* v. *Knight* (1). The notices cannot be any better than they would have been if no compensation had been demanded. Vice-Chancellor *Bacon*, in *North London Land Company* v. *Jacques* (2), considered that a notice under sect. 14, sub-sect. 1, was bad because it had not demanded money compensation, and that this was so appears in the statement of what had happened before Vice-Chancellor *Bacon* in a report of another stage of the same litigation: *Jacques* v. *Harrison* (3); and in an action in the Queen's Bench Division Lord Justice *Bowen* expressly decided the point in the same way: *Greenfield* v. *Hanson* (4).

Upjohn, for the Defendant :—

In the first place, there is no jurisdiction to give this relief on an application by originating summons. In the second place, the Plaintiffs are out of time; relief against forfeiture can only be given before possession has been taken: *Quilter* v. *Mapleson* (5).

(1) [1891] 2 Q. B. 542.
(2) 32 W. R. 283.
(3) 12 Q. B. D. 136, 165.
(4) 2 Times L. R. 876.
(5) 9 Q. B. D. 672.

As to the point taken on the other side, that the notice to repair was not sufficient, in the first place, this is not the time or place in which that point can be raised; it ought to have been taken as an answer to the ejectment actions, or if it could not have been taken then by the present Plaintiffs, it might be the foundation of proceedings to get possession. But the objection has nothing in it; the reported cases relied on are unsatisfactory. The first was really one before Vice-Chancellor *Bacon* arising out of *Jacques* v. *Harrison* (1), and Lord Justice *Bowen*, it is said, at *nisi prius* followed the Vice-Chancellor. It would be absurd to say, that where no compensation in money is wanted, or even where there could be none, compensation must be demanded; the reasonable construction of the provision, that in any case compensation money is to be required, is that, unless it is required, nothing by way of damage or compensation is to be paid to the lessor. Such was the view of a strong Court of Appeal in *Skinners' Company* v. *Knight* (2).

Oswald, in reply:—

As to the mode of procedure, the lessees are empowered to apply for relief to the High Court in the lessor's action, or an action brought by themselves; they could not apply in the lessor's actions because they were in the county court; they were forced to bring an action themselves, and for this purpose an originating summons, I submit, is an action.

If it be the case that application for relief must be made before possession is taken, application was made as soon as it could be, and before possession was taken; it was only by the accident of circumstances that the motion was not heard before possession was snatched.

NORTH, J. (having stated the facts, continued):—

An objection is taken to the proceedings on the ground that relief cannot be given under sect. 14, sub-sect. 2, of the *Conveyancing and Law of Property Act*, 1881, on originating summons. How does the matter stand on principle? Would it make any

(1) 12 Q. B. D. 136, 165.

(2) [1891] 2 Q. B. 542.

NORTH, J.
1892
LOCK
v.
PEARCE.

difference in substance whether the lessee takes out an originating summons in the first instance, or issues a writ and immediately afterwards takes out a summons? As far as I can see, except for technicality, the position of the parties would be exactly the same. Then, is there any authority on the point? There is something that comes near it in the case of the *North London Land Company* v. *Jacques* (1); the proceedings are not very intelligible from that report, and when you look at the report of another stage in the same proceedings in *Jacques* v. *Harrison* (2), it is still more difficult to get at the facts, because the reports do not agree. I think in that case a writ must have been issued first, and immediately afterwards a summons taken out. But it is not necessary for me to decide the point, as I can dispose of the case upon other grounds.

Then it is said that this application was too late because possession had already been recovered. In my opinion, that contention is not well founded. I think the application was made when the summons was taken out; and relief can be given on the summons, as far as time is concerned, if in other respects the mode of procedure is right.

A point of law is set up by the Applicants as a reason why the lessor is not entitled to keep the property, namely, that the proceedings in the county court were altogether bad because the notice to repair the breaches of covenant did not comply with the requirements of sect. 14, sub-sect. 1, of the *Conveyancing and Law of Property Act*, 1881, in that it did not require the lessee to make compensation; and that therefore no valid proceedings could be taken by the landlord to recover possession. If that were so, I do not see what ground the lessee would have for relief under sub-sect. 2. But, in my opinion, the objection is not well founded. By sub-sect. 1 the lessor, "if the breach is capable of remedy," must by his notice require it to be remedied, "and in any case"—which must mean whether the breach is capable of remedy or not—require the lessee to make compensation; and it is said that here the notice was bad because it did not require the lessee to make compensation in money. In the first place, the notice did require compensation to be made in

(1) 32 W. R. 283. (2) 12 Q. B. D. 136, 165.

money, although the compensation asked for could not be insisted on. Further, the objection is founded on two cases: one, the case before Vice-Chancellor *Bacon*, referred to above—*North London Land Company* v. *Jacques* (1)—the facts of which are referred to also in *Jacques* v. *Harrison* (2). As far as I can make out from the reports, Vice-Chancellor *Bacon* pointed out (though it was not a point decided by him) that the notice was bad because it did not claim compensation, and the person served might have put in a defence on that ground. Another case was cited for the same proposition—*Greenfield* v. *Hanson* (3)—in which Lord Justice *Bowen*, sitting as a Judge of first instance in the Queen's Bench Division, said that counsel for the plaintiff had cited the case of *Jacques* v. *Harrison*, in which Vice-Chancellor *Bacon*, on a summons taken out before him to set aside a forfeiture on the ground that no proper notice under the *Conveyancing Act*, 1881, had been given before the action had been brought, as the notice which had been given had contained no request to the lessee to make compensation in money for the breaches of covenant which were the causes of forfeiture, intimated it as his opinion that the notice was insufficient and that the judgment ought to be set aside. He (Lord Justice *Bowen*) was bound to follow that decision, nor did he venture to express any opinion adverse to it. But sub-sect. 1 of sect. 14 of the *Conveyancing Act*, 1881, appeared to him to be cast in an iron framework and to be an instance of formidable legislation with which to remedy an existing ill, so to speak, by fire and sword. No thought had been taken of the evil which might be done by the Act. But it was an Act of Parliament, and he was bound to give effect to it, and must do so in the same way as the Vice-Chancellor had already done in *Jacques* v. *Harrison*.

According to those two cases, it would appear that when a lessor gives notice of breach of covenant under sect. 14, sub-sect. 1, of the Act, in order to enforce a right of re-entry under sect. 14, sub-sect. 2, he must, with his notice of breach, require compensation in money to be paid whether he wishes to have

(1) 32 W. R. 283. (2) 12 Q. B. D. 136, 165.
(3) 2 Times L. R. 876.

NORTH, J.
1892
LOCK
v.
PEARCE.

compensation or not, and, further than that, whether there can or cannot be any proper compensation assessed. Supposing a case where there is a covenant to keep the premises insured against fire, and there is an omission to renew an insurance, from some oversight which has been put right at once, I should like to know what compensation could be asked in such a case. It is exceedingly difficult to understand that. If, however, there were two decisions on the point, and nothing else, by the Vice-Chancellor and Lord Justice *Bowen*, though the latter was only acting as Judge of First Instance, I should feel bound to follow them; but the matter has been settled in a way that I can understand by the Court of Appeal in *Skinners' Company* v. *Knight* (1), where Lord Justice *Fry*, giving the written judgment of himself and Lord *Halsbury* and Lord *Esher*, said: "The required notice has been served; the lessee must for the present purpose be taken to have remedied the breach within a reasonable time. Has he failed to make reasonable compensation in money for the breach because he has failed to repay the plaintiffs the expenses to which they have been put in employing the surveyor and solicitor to prepare and serve the notice? The section creates some difficulty, because it seems to contemplate compensation as payment in every case of a breach, and because it uses, not the familiar word 'damages' for a breach, but 'compensation.' But it is evident that many cases may occur in which, where the breach has been perfectly made good and no expense or loss incurred, there may be nothing for which to make compensation, and we are therefore of opinion that, notwithstanding the general terms of the notice required by the statute, the lessee is bound to make compensation, not absolutely in every case, but only where there is something to compensate."

That is a very intelligible construction to put on the Act. I am very glad to have that assistance in coming to the conclusion which I do that the notice was good, and would have been good if no compensation had been asked for. In each notice a sum of two guineas was asked for in respect of solicitor's and surveyor's fees, which the lessor was not entitled to; no other compensation in money was asked for or could be asked. It is said

(1) [1891] 2 Q. B. 542, 544.

that the passage I have read is only an *obiter dictum*; but I think the observation requires no answer.

There remains the question whether the Applicants on the merits have made out a case for relief.

[His Lordship on the facts dismissed the summons.]

Solicitors for the Plaintiffs to the summons: *Thos. Noton.*
Solicitors for the Defendant: *Pearce & Sons.*

D. P.

STIRLING, J.

1892

March 19; *April* 12.

HOPE *v.* HOPE.

[1892 H. 629.]

Husband and Wife—Real Estate of Wife—Devolution—Tenancy by the Curtesy—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1 *sub-s.* 1, 5.

Notwithstanding the provisions of sect. 1, sub-sect. 1, and sect. 5 of the *Married Women's Property Act*, 1882, a husband is still entitled, on the death of his wife, to an estate by the curtesy in her undisposed of real estate.

THE Plaintiff, *William Charles Hope*, was an infant, suing by his next friend, and the Defendant, *William Richard Hope*, was his father. The action was instituted for the purpose of obtaining the decision of the Court upon the question, whether the Defendant was entitled to an estate by the curtesy in certain real property which had belonged to his wife, the mother of the Plaintiff. Mr. and Mrs. *Hope* were married before the *Married Women's Property Act*, 1882, came into operation. Under the will of her father, *J. C. Davis*, who died in October, 1891, Mrs. *Hope* became entitled to the legal estate in an undivided share of certain real estate. She died in November, 1891, intestate, and possessed of the property in question. The Plaintiff was her eldest son and heir-at-law.

The question was first raised upon an originating summons; but by the direction of the Court a writ was issued, and the case was ordered to be set down for trial without pleadings.

T. L. Wilkinson, for the Plaintiff:—

The property on Mrs. *Hope's* death passed directly to her heir. In order to constitute tenancy by the curtesy, there are certain requisites. One of those is that the wife must have held the property as a married woman: *Blackstone's* Commentaries (1). Here Mrs. *Hope* did not hold as a married woman, but by virtue of sect. 1, sub-s. 1, and sect. 5 of the *Married Women's Property*

(1) 4th Ed. vol. ii. p. 107.

Act, 1882, as a *feme sole*. There cannot, therefore, be an estate by the curtesy in the husband.

Under the law as it subsisted before the Act when property was settled upon a married woman in such a manner as to shew an intention that the husband was to have no interest, he was held not entitled to an estate by the curtesy: *Roper* on Husband and Wife (1); *Bennet* v. *Davis* (2). The Act shews an intention to exclude husbands generally from all interest in the property of their wives.

In *Cooper* v. *Macdonald* (3), *Jessel*, M.R., sums up the whole law, and, according to that decision, the effect of the words "in the same manner as if she were a *feme sole*" is to destroy the right of the husband altogether.

The words of the Act must mean more than that the wife is to hold for her separate use; otherwise they are mere surplusage.

Abraham, for the Defendant:—

There is no ground for the contention that the rights of the husband are interfered with for any purpose beyond the object and scope of the Act. His rights in respect of property belonging to his wife and undisposed of by her remain the same as they were before the Act: *In re Lambert's Estate* (4). The reasoning in that case applies equally to real estate.

The words "as a *feme sole*" do not necessarily relate to the holding of property; their application may be confined to the power of disposing of property. But that is not essential for the purpose of my argument. It is clear that in order to entitle the husband to an estate by the curtesy he need not have had any estate either legal or equitable in his wife's property during her life: *Cooper* v. *Macdonald*. If the intention of the Legislature had been to alter the devolution of property and to deprive the husband of rights which, it is admitted, have vested in him for centuries past, the Act would have contained express provisions to that effect.

[STIRLING, J.:—If the Act is to be read as strictly as is

(1) 2nd Ed. vol. i. p. 21.
(2) 2 P. Wms. 316.
(3) 7 Ch. D. 288.
(4) 39 Ch. D. 626.

STIRLING, J. contended, it would seem that the property ought not to devolve upon the Plaintiff.]

1892

HOPE v. HOPE.

The Act was intended to confer certain benefits upon married women, and its operation ought not to be extended beyond that object.

Wilkinson, in reply:—

I do not contend that the words of the Act alter rights of devolution arising solely on the death of a married woman. But the estate by the curtesy is not such a right. It has its beginning during the coverture, and gives the husband wider powers during the coverture, and for that reason I contend that he is deprived of all his marital rights in respect of his wife's property. The words of sub-sect. 1 must be read as if they were contained in a will or deed giving property to a married woman, in which case they would have the effect of depriving the husband of all marital rights in such property. There are two classes of limitations to married women which have the effect of restricting the right of the husband. One is where the limitation is simply to the wife for her separate use, as in *Cooper* v. *Macdonald* (1). The effect of such a limitation is to deprive him of his marital rights during the coverture.

Another class of limitation is where other words are added after the limitation to the separate use, and in such a case the marital right is entirely destroyed; and I contend that the words of this Act were intended by the Legislature to have that effect.

Bennet v. *Davis* (2) has been recognised by Sir *J. Leach* in *Morgan* v. *Morgan* (3); and in *Moore* v. *Webster* (4) Sir *J. Stuart* says: "The authorities are as clear as the principle. Real estate may be limited to the separate use of a wife, so as not to exclude entirely the husband's marital right; and, unless his marital right be wholly excluded, he is not necessarily excluded from being tenant by the curtesy. . . . . In this case, however the words operate as a total exclusion of the whole marital interest, and the case for the husband fails."

(1) 7 Ch. D. 288.
(2) 2 P. Wms. 316.
(3) 5 Madd. 408, 411.
(4) Law Rep. 3 Eq. 267, 269.

The words "in the same manner as if she were a *feme sole*" were inserted by the Legislature for the purpose of excluding the whole of the husband's rights, not merely the rights to which he was entitled during the coverture, but so as to pass the property to the heir of the wife. They must have been introduced for some specific purpose, and I contend that they should have the same effect as if they were found in a will or deed.

A *feme sole* may have heirs of her body—she may be a widow.

[*Abraham* :—*Moore* v. *Webster* (1) was commented on by Sir *G. Jessel* in *Cooper* v. *Macdonald* (2).]

STIRLING, J. (after stating the facts, continued) :—

Apart from the *Married Women's Property Act*, 1882, there would have been no question as to the husband's right to an estate by the curtesy. The question is whether the language of that Act is sufficient to exclude his right to such an estate. Sect. 5 of the Act provides that every woman married before the commencement of the Act shall be entitled "to have and to hold and to dispose of in manner aforesaid as her separate property," all real and personal property her title to which shall accrue after the commencement of the Act. That sends us back to the prior sections of the Act. Sect. 1, sub-sect. 1, provides that "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property, as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee." So far as the legal rights of any person claiming under the wife, whether the husband, or any other person, stand in the way of giving effect to that enactment, they must be set aside. But the question here does not relate in any way to the acquiring, holding, or disposing of any property. The married woman is dead, and the question is as to the devolution of the estate upon her death. Does it devolve upon her heir at once, or does the husband take an estate by the curtesy during his life? It appears to me that I ought not to extend the operation of the Act beyond its express provisions. In other Acts where the Legislature has intended

(1) Law Rep. 3 Eq. 267, 269. (2) 7 Ch. D. 288.

STIRLING, J. 1892 HOPE v. HOPE.

to interfere with the devolution of property it has expressly provided for so doing. For instance, in the *Divorce and Matrimonial Causes Act*, 1857 (20 & 21 Vict. c. 85), it is provided (sect. 25) that in every case of a judicial separation the wife is, while the separation continues, to be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead. In the *Married Women's Property Act*, 1882, there is no such provision. The only provision is that, with reference to the acquiring, holding, or disposing of property, a married woman is to be capable as if she were a *feme sole*. Then, if regard is to be had to the analogy of the practice of the Courts of Equity in dealing with property settled to the separate use of a married woman, it appears to me that it is opposed to the claim put forward on behalf of the infant.

As regards property settled simply to the separate use of a married woman, the question was dealt with by the late Master of the Rolls (Sir *G. Jessel*) in *Cooper* v. *Macdonald* (1), where he says: "I will first of all consider whether he had an estate by the curtesy or not, because that has been very much argued. It appears to me that he had and he had not, that is to say, as I understand the law, if the married woman had never appointed or alienated the estate, but had died being tenant in tail in equity or tenant in fee in equity, the husband would have had an estate by the curtesy, whether the estate of the married woman was merely equitable without the separate use, or whether it was equitable together with the separate use; and my reason for saying so on principle is this, that with one notable exception familiar to conveyancers, that of dower, in the incidents of estates equity follows the law, and that would therefore give to the husband the same estate by the curtesy in his wife's equitable estate as he would have in her legal estate. There was no reason to the contrary. When the wife died intestate—for that is the assumption—her husband would take some-

(1) 7 Ch. D. 288, 295.

thing and her eldest son would take something, and they would be both equitably entitled. As I said before, there was no reason why that disposition should be altered in any degree. The wife's property would descend to her eldest son, subject to the husband's estate; there equity followed the law; but then came the separate use of the wife, which engrafted something on the equitable estate; it took away from the husband the right to receive the income during the coverture, or, as it was called, the equitable estate during the coverture; it gave the wife the absolute ownership during the coverture, and if the separate use attached also to the capital, it gave her the right of disposing of it either by deed or will irrespective of the husband. It therefore appears to me that to carry that out, the right to the separate use entitled her to dispose of it as much against the husband's estate by the curtesy as against the son's estate as heir. It enabled her to make a pure and clear disposition of it, and in that way it was wholly independent of the husband. But that is no reason for carrying it a step beyond. The separate use, if I may say so, is exhausted when the wife has died without making a disposition. She enjoyed the income during her life, and she has not thought fit to exercise that which was an incident of her separate estate, the right of disposing of her property. Why should equity interfere further with the devolution of the estate?"

Mutatis mutandis, those words seem to apply to the Act of 1882. The object of the Legislature in that Act was similar to the object of the Courts of Equity in dealing with property settled to the separate use of a married woman; but the Legislature, having wider powers, has gone further. It has said that a married woman shall be in the same position as regards the acquiring, holding, or disposing of property as if she were a *feme sole*—that is to say, all the legal rights with reference to these matters which an unmarried woman would have are conferred upon a married woman. It was said, however, that if that is so, all that is sought to be effected could have been done if the enactment had been simply that a married woman should be capable of acquiring, holding, and disposing of any real or personal property as her separate property, and that the

STIRLING, J. 1892 HOPE v. HOPE.

words "in the same manner as if she were a *feme sole*" might just as well have been omitted. I do not think so. If those words had been omitted there might still have been a question whether the rights so conferred were to be treated as legal or equitable; and I think that the words "as if she were a *feme sole*" shew that the Legislature intended all such rights to be treated not merely as equitable but as legal. That relieves me from considering the class of cases referred to in *Roper* on Husband and Wife (1), in which it has been held that when the language of a settlement went beyond a mere limitation to the separate use of a married woman Courts of Equity would give effect to it. The truth is, that in those cases something more was done than the mere limitation of a separate use. In the case cited by Mr. *Wilkinson* the property was intended to be settled so as to exclude the husband altogether. Am I to come to the conclusion that the Legislature intended that the Act of 1882 should have that effect? I find no indication of such an intention. As regards the acquiring, holding, and disposing of property, there is indication of an intention to interfere with the husband's rights, and full effect must be given to it; but, as regards the devolution of property on an intestacy, I can find no indication of any intention to exclude the husband. I think, therefore, that the husband is entitled to an estate by the curtesy in the real estate of his wife, and I make a declaration accordingly. The costs of all parties as between solicitor and client will come out of the estate.

Solicitors for Plaintiff: *Howard & Atherton.*
Solicitors for Defendant: *Maynard & Son.*

(1) 2nd Ed. vol. i. p. 21.

G. A. S.

HITCHCOCK *v.* STRETTON.

STIRLING, J.

[1890 H. 2391.]

1892

March 9, 10, 15; *April* 12.

Solicitor—Costs—Taxation after Payment—Non-delivery of Bill—Retention of Costs by Solicitor out of Client's Moneys— Settled Accounts — Subsequent delivery of Bill—Attorneys and Solicitors Act (6 & 7 *Vict. c.* 73), *s.* 41 [*Revised Ed. Statutes, vol. ix., p.* 132].

A firm of solicitors kept a running account with a client in which they credited him with moneys received, and debited him with disbursements. They also, from time to time, debited him with sums in respect of costs for professional business transacted by them as his solicitors. No bills of costs were delivered by the solicitors, but their accounts were periodically balanced and signed by the client, as "settled and approved," but no bills of costs were delivered. The last account so signed by the client was dated the 19th of May, 1886. In 1890, he brought an action for an account and for delivery of a bill of costs. After the issue of the writ, the solicitors delivered a bill of costs. There was no evidence of fraud or pressure on the part of the solicitors, and the bill delivered contained no items of gross overcharge.

At the trial, the Plaintiff abandoned his claim for an account, but insisted upon his right to have the bill of costs taxed:—

Held, that the payments which had been made in account, were referable to the bill subsequently delivered, and that there were no special circumstances entitling the client to an order for taxation.

In re Stogdon (1) considered and explained.

Action.

The Defendants, Messrs. *Stretton, Hilliard, Dale, & Newman*, were solicitors, and acted in that capacity for the Plaintiff, with whom they had considerable monetary transactions. They had received money and made disbursements on his account, and had transacted professional business for him, as his solicitors; in respect of which he became indebted to them for costs. Until after the commencement of this action, the Defendants did not deliver any bills of costs to the Plaintiff, but kept, in their cash book, an account with the Plaintiff, in which various sums were credited to and debited against him; among the sums so debited to him being certain amounts which, from time to time, became due to the Defendants for costs. The amounts so debited to the Plaintiff

(1) 56 L. J. (Ch.) 420.

STIRLING, J. 1892 HITCHCOCK v. STRETTON.

were deducted by the Defendants from moneys in their hands belonging to the Plaintiff, and for which they thus accounted. The accounts between Plaintiff and Defendants were periodically balanced, and on these occasions the Plaintiff signed them as having been "settled and approved" by him.

The first of such accounts commenced in 1878, and was signed by the Plaintiff on the 6th of November, 1879, on which day he also signed a short account between himself and Mr. *Stretton*. The next account with the firm began on the 30th of April, 1880, and was signed by the Plaintiff on the 17th of September, 1880. On that day, a fresh account was opened with a balance due to the Plaintiff, as found by the preceding account. The account so opened was wound up and signed by the Plaintiff, on the 19th of May, 1886, the balance due to the Plaintiff, at that date, being £236 18*s.* 7*d.*

On the 17th of November, 1889, Mr. *Stretton* died.

On the 7th of July, 1890, the Plaintiff issued his writ in this action, claiming, *inter alia*, to have an account taken of all dealings and transactions between him on the one hand and Mr. *Stretton* and the other partners in the firm, on the other hand, and to have proper bills of costs delivered, and judgment for the amount found due to him. The executors of Mr. *Stretton*, by their defence, pleaded, that all sums received by him or his partners on behalf of the Plaintiff had been duly paid over or accounted for to the Plaintiff, and that the Plaintiff had signed and approved the accounts, and the same were settled accounts. The other partners did not plead settled accounts; but they alleged that they and their firm had always been, and still were, ready and willing, and thereby offered to furnish the Plaintiff with full and proper accounts of all the receipts and payments, and to deliver to him proper bills of costs, and to have such bills of costs taxed if the Plaintiff desired it.

After the issue of the writ, the Defendants delivered a bill of costs.

At the trial of the action, it appeared, after the Plaintiff had been examined and cross-examined, that there was no case for impeaching in any way the correctness of the accounts, and counsel for the Plaintiff stated at the Bar, that he did not desire

to call in question any of the items in such accounts, except those representing costs; but he claimed, as a matter of right, to have the bill of costs taxed.

There was no evidence of any fraud or pressure upon the part of the Defendants, nor that any of the items of their bill were grossly overcharged.

Hastings, Q.C., and *Beddall*, for the Plaintiff:—

We are entitled to have the bill taxed. No bill was delivered until after the action was brought, and the mere retainer by a solicitor out of moneys belonging to his client is not equivalent to payment within the meaning of sect. 41 of 6 & 7 Vict. c. 73, so as to preclude the right to taxation: *In re Street* (1).

Sir *H. James*, Q.C., and *Ashton Cross*, for the executors of Mr. *Stretton*:—

In re Street was decided upon special and peculiar circumstances: *In re Hall and Barker* (2). The transaction between the parties in this case was equivalent to payment, and the Court will not, in the absence of evidence of gross overcharge, upset the arrangement. No case of overcharge is made out here: *Ex parte Hemming* (3); *Stedman* v. *Cöllett* (4); *Johnson* v. *Fesemeyer* (5); *Ward* v. *Sharp* (6). The application should have been made in Mr. *Stretton's* lifetime. The business, in respect of which taxation is now sought, was transacted years ago; and it would be very difficult for the executors to prove every item in bills of costs relating to business, as to which they know nothing.

Hastings, in reply:—

There is no question as to the jurisdiction of the Court under 6 & 7 Vict. c. 73, s. 37, to order taxation against the executors of a deceased solicitor, and there are no circumstances in this case to induce the Court not to exercise that jurisdiction: *Ex parte Shackell* (7); *In re Street* was followed by Mr. Justice

(1) Law Rep. 10 Eq. 165.
(2) 9 Ch. D. 538.
(3) 28 L. T. 144.
(4) 17 Beav. 608.
(5) 3 De G. & J. 13.
(6) 53 L. J. (Ch.) 313.
(7) 2 D. M. & G. 842.

STIRLING, J. 1892 HITCHCOCK v. STRETTON.

Chitty in *In re Stogdon* (1), and in that case he distinguished *Ex parte Hemming* (2) on the ground that there a bill of costs had been delivered. Here no bill was delivered until after action brought. A solicitor cannot set up retainer as payment so as to deprive his client of the right to taxation.

Ashton Cross:—*In re Stogdon* cannot be reconciled with *In re Heritage* (3), in which it was held that there can be payment within the meaning of sect. 41 of the Act 6 & 7 Vict. c. 73, although no bill has been delivered.

Hastings:—There was no retainer in *In re Heritage*.

1892. April 12. STIRLING, J. (stated the facts, and continued):—

Now the question is, as a matter of law, is the Plaintiff, under these circumstances, entitled to taxation of the costs? If he is, all the charges in the statement of claim having failed, it seems to me that he ought to stand exactly in the same position as if he had made an application under the *Attorneys and Solicitors Act* for taxation of the bills. The case which is relied upon for the Plaintiff is the decision of Lord *Romilly* in *In re Street* (4). That was a summons adjourned from Chambers, for the taxation of three bills of costs of Mr. *Street*, in relation to the sale of three estates, sold by him as a trustee under a trust deed, which provided that he might act as solicitor in the matter, and be paid for business done by him, as if he were not a trustee. Pausing there, I may remark that the case is somewhat special, because it is a case of a solicitor trustee, who was in the position that he could not in any way settle an account; he was at once trustee and solicitor, and there was no person with whom he could agree in any way as to the amount of the costs. The sales of the estates, the report states, were completed in August, 1867, September, 1868, and July, 1869, respectively; in each case the purchase-money was received by *Street*, who retained out of it the amount of his bill of costs, and paid the balance to the *cestuis que trust*. About a month after completion of each sale, *Street* sent to each

(1) 56 L. J. (Ch.) 420.
(2) 28 L. T. 144.
(3) 3 Q. B. D. 726.
(4) Law Rep. 10 Eq. 165.

of the *cestuis que trust* an account shewing the receipts and payments of the trustees relating to each sale, in which the total amount of the bill of costs was entered under the head of "vendors' costs, charges, and expenses in effecting the sale of the estate." All of the *cestuis que trust* signed the accounts, and gave receipts for their shares of the purchase-money. The bill of costs in relation to the second sale was delivered to the applicants in that case, who were two of the *cestuis que trust*, on the 30th of December, 1868, and the bills of costs in relation to the 1st and 3rd sales were delivered to the solicitors of the applicants on the 25th of February, 1869, and the 18th of August, 1869, respectively. Then a clerk of the applicants' solicitors made an affidavit in support of the summons, stating that each of the bills contained a great number of items of overcharge, and specifying items of alleged overcharge in the first and second bills. Lord *Romilly* said (1): "I am of opinion that the applicants are entitled to have all these bills taxed. I have held over and over again that there can be no payment, within the meaning of the 41st section of the Act, before the bill has been delivered, and before the client has had the opportunity of seeing the items. If a solicitor sells an estate, receives the purchase-money, deducts the amount of his costs, and pays the balance to the client, that is not payment within the 41st section, if he has not delivered his bill of costs. . . . . I have looked at the bills, and I think that some of the items of alleged overcharge are serious, though I express no opinion upon them, as that is a question for the Taxing Master." Now that case has been commented on, and explained recently by Mr. Justice *Chitty* in *In re Stogdon* (2). The head-note is this: "From February, 1874, to August, 1879, *S.* had acted as the solicitor and man of business of *B.*, a married woman, and during this period had wound up her former husband's estate, collected her rents, and managed her estates, lent her money, and negotiated mortgages for her. In the course of these transactions the various items of receipt and payment on her behalf, including costs and professional charges, were entered in a book of accounts kept by *S.* Copies of these accounts were sent to *B.* from time to

(1) Law Rep. 10 Eq. 167.

(2) 56 L. J. (Ch.) 420.

STIRLING, J. 1892 HITCHCOCK v. STRETTON.

time, and one of the mortgages by *B.* to *S.* contained a recital that they had been gone through and settled. In August, 1879, when a mortgage was negotiated from a third person of sufficient amount to pay off *B.'s* debt to *S.*, the accounts were gone through and explained to *B.*, when *S.* retained the amount due to him for advances, and for his costs and professional charges, out of the mortgage money, and carried the balance to her credit in the book of accounts. *B.* thereupon signed the account. *S.* continued to act for *B.* as before, down to the end of 1885. *B.* had no independent advice when she signed the account in August, 1879. On an application by *B.* and her husband for the delivery and consequent taxation of bills of costs from February, 1874 to August 1879:—*Held*, following *In re Street* (1), that there had been no payment within the meaning of 6 & 7 Vict. c. 73, sect. 41, and that *B.* was entitled to an order for delivery of proper bills of costs for the period required, and a consequent taxation, notwithstanding the lapse of time and the signature by *B.* of the accounts." I may point out that with reference to the facts, Mr. Justice *Chitty* says this (2): "No bills of costs in respect of services up to 1879 were delivered, but sums for costs—lump sums—sometimes round sums, and sometimes not, are found scattered through certain long accounts extending over the period between 1874 to 1879, and the detailed amount of those items, I am told, I have no doubt correctly, is some £2200. One of the items is arrived at in this way, 'Costs in *Baker* v. *Smee* say £420,' evidently a mere estimate." Now, in that case, no bills of costs were delivered, and the solicitor simply relied, as far as appears, on this settlement of account. Mr. Justice *Chitty* says: "The case for the applicant is founded upon the proposition laid down by Lord *Romilly* in *In re Street* and if that proposition is good law, it is clear that there must be an order for the delivery and taxation of these bills." He then read the portion of the judgment of Lord *Romilly*, which I have just read, and continued:—"I think Lord *Romilly* stated his own practice correctly. It was the constant course of the Court in his time to have applications for the taxation of solicitors' bills, including all questions

(1) Law Rep. 10 Eq. 165. (2) 56 L. J. (Ch.) 422, 423.

under the *Solicitors Act*, and I understand Lord *Romilly* to state here in definite terms his settled practice. It would require argument much stronger than that which I have heard to enable me to say that his decision is wrong. In my opinion it is right, if it were necessary for me to add my opinion, because the 41st section, to which reference is made, is a section relating to the payment of a bill. It is the section which enables the Court under special circumstances to direct the taxation of a bill after payment, and the language of the section is 'the payment of any such bill;' and Lord *Romilly's* view evidently was—although he does not so state it, I understand him to mean it—that the section, from the very terms in which it is expressed, implies that there is a bill of costs which has been delivered. If Lord *Romilly* is right, there is an end of the case."

Then he goes on to deal with the cases which were cited, one of which was cited to me, and very much relied on, and I shall postpone, therefore, the rest of his judgment until I have mentioned that case. It is that of *Ex parte Hemming* (1), of which there is only a somewhat short report. It was a case before the Court of Common Pleas, and came on as a motion calling on Messrs. *Bischoff & Coxe* to shew cause why certain bills for attorney's work done by them for the applicant, Mr. *Hemming*, should not be referred to taxation. The bills were in respect of mortgages and sales of estates during the years 1851, 1852, and 1853. Payments had been made by Mr. *Hemming* on account, and an account current delivered to him on the 5th of December, 1855, when Messrs. *Bischoff & Coxe*, on paying him some moneys, deducted the amount of the account, and a receipt was given. Afterwards Mr. *Hemming* demanded the bills, and on the 18th of August, 1856, bills of items were delivered, which altogether amounted to more than had been paid, and under these circumstances an application to tax was made. *Cockburn*, L.C.J., says this: "On Messrs. *Bischoff & Coxe* undertaking to abandon their claim as to the fresh bills, I think that the rule should be discharged as to the residue. It seems to me that what took place amounted to payment, unless there has been some gross overcharge, which would lead to a fair

(1) 28 L. T. 144.

STIRLING, J. 1892 HITCHCOCK v. STRETTON.

inference of fraud and over-reaching. It appears that they had money in their hands raised by mortgage, when in 1855 they came to a final settlement, in which these bills were included. Mr. *Hemming* submitted to those charges so made, acknowledged the account, and kept the balance in liquidation of the account. It has been ingeniously put that this does not amount to a payment; but it is the ordinary case of a man accepting a balance in liquidation of an account, and, I think, therefore, that these bills are paid and finally settled. Then is there anything to shew a fraudulent over-reaching? If so, we should give protection; but though there may be some items capable of being reduced, yet there is nothing pointed out which is so grossly excessive that it should be referred." *Williams*, J., says, "I am of the same opinion; and I also think that this bill was paid within the meaning of the 41st section of the *Attorneys Act*." *Crowder*, J., says, "I think, without reference to its being a payment within the 41st section, about which I give no opinion, that this is a payment of the claim, costs, and charges, which are made within the ordinary rule of a bill rendered and balance accepted, which amounts to a payment." *Willes*, J., says, "There is nothing to prevent a man, *sui juris*, settling his attorney's account without taxing it; he may pay if he like; and if that is not to be conclusive in the case of an attorney, just as in that of a grocer or butcher, then we should have a man, after a bill had been delivered, coming here with the numerous objections which may be raised, to upset that settlement. I also agree with my Brother *Williams* that this is a payment within the 41st section." That case is discussed and explained by Mr. Justice *Chitty* in *In re Stogdon* in this way (1): "Now the case of *Ex parte Hemming* (2), which was in the Court of Common Pleas, and was decided before the Master of the Rolls' decision of *In re Street* (3), was cited to him, and if the two cases are adverse—which I do not think they are when they are looked at—it is clear that Lord *Romilly* acted on his own settled practice. In *Ex parte Hemming*, there had been a settlement of account, and that which in point of law would have

(1) 56 L. J. (Ch.) 424. (2) 28 L. T. 144.
(3) Law Rep. 10 Eq. 165.

amounted to payment if the case had been one between, say, a customer and a tradesman. But there had been no bill of costs delivered at the time, but subsequently the solicitor did deliver his bill of costs, and the application for payment was not made within one month after that bill had been delivered, but subsequently. Then this being a delivered bill, the Judges looked at the bill which had been delivered, and held that there had been no overcharge of that nature which would amount to fraud, and consequently they said if the solicitor would withdraw—and he agreed to do it—any demand beyond the sum which he had received for his bills as delivered which shewed that the client owed him more than he had accepted, they would not direct a taxation. It was a case, therefore, of a bill delivered with a previous payment made, and they looked into the case and saw that the payment was the payment of a fair and reasonable amount with regard to the service that had been performed. That is not the case Lord *Romilly* had at all. In the case before Lord *Romilly* in *In re Street* (1), no bill of costs had been delivered whatever. I hold, therefore, though there may be according to this report some expressions of the Judges which would be inconsistent with what Lord *Romilly* said, that *Ex parte Hemming* (2), when properly considered, is not inconsistent with the authority of *In re Street*." It seems to me that the explanation given by the learned Judge of the case of *Ex parte Hemming* comes to this, that although, if no bill of costs is delivered at all, then there is no payment within the meaning of the 41st section of the *Attorneys and Solicitors Act*, 1843, yet if a bill is delivered after a payment previously made, then the Court may look at the whole circumstances, and come to the conclusion that the payment which has been made is referable to the bill which is subsequently delivered, and, in that case, unless the Court finds special circumstances such as would justify the taxation of a bill under sect. 41, it is not a matter of course that the bill should be taxed. Now here there has been, in my opinion, a settlement of account such as there was in *Ex parte Hemming*. A bill is admitted to have been delivered; but it has not in any way been submitted to me. Any case of fraud or pressure seems to

(1) Law Rep. 10 Eq. 165. (2) 28 L. T. 144.

STIRLING, J. 1892 HITCHCOCK v. STRETTON.

me to be entirely negatived by the evidence, and there is nothing before me on which I can come to the conclusion that the bill contains items of gross overcharge; and I think, under these circumstances, that a case is not made out for taxation of the bill.

Solicitors: *Robert Chapman; J. E. Turner; Stretton, Hilliard, Dale & Newman.*

G. A. S.

STIRLING, J. 1892 *Feb.* 27: *March* 11.

MORRIS *v.* DELOBBEL-FLIPO.

[1892 M. 472.]

Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 1—*Principal and Agent—Agreement making Goods in Agent's hands Security for his Advances to Principal—Bill of Sale.*

By an agreement in writing, made between the Defendant, a foreign manufacturer, and the Plaintiff, his agent in *England*, it was provided that advances made by the Plaintiff for expenses should be "covered and secured by the stock of goods which shall be in his hands," which the Defendant bound himself should not fall below a certain value.

The Defendant terminated the agency and asserted the right to remove the goods remaining in the Plaintiff's hands without satisfying his claims for the expenses of the agency, upon the ground that the agreement conferred a right in equity to, or created a security upon, the goods, and, not having been registered as a bill of sale, was void.

In an action by the Plaintiff for wrongful dismissal:—

Held, (1.) that the agreement did not empower the Plaintiff to seize any goods, but merely entitled him to retain possession of goods after they had come into his hands; (2.) that when the goods had come into his hands there was an agreement coupled with possession which created a legal and not an equitable right, and consequently that, according to the principle of *Reeves* v. *Barlow* (1) and *Ex parte Hubbard* (2), the agreement was not void as a bill of sale within the meaning of the *Bills of Sale Act*, 1882.

THIS was an action by an agent against his principal for wrongful dismissal, in which the Plaintiff now moved for an injunction to restrain the Defendant from interfering with his rights under a written agreement; and the Defendant objected that the instrument in question was a bill of sale within the *Bills of Sale Acts*, and void for want of registration.

(1) 12 Q. B. D. 436. (2) 17 Q. B. D. 690.

The Defendant, M. *Delobbel-Flipo*, was a manufacturer or dealer in goods at *Roubaix*, in *France*. He employed the plaintiff *Morris* to act as his agent in *England* for the sale of certain goods. The terms of the agency were at first arranged verbally, but they were afterwards reduced to writing, and were contained in a document in the French language, which bore date the 26th of December, 1890, although according to the evidence it was not really signed on that day. The material provisions of this agreement, translated into English, were as follows: "M. *Delobbel-Flipo* will supply all the expenses of the *London* agency, which may reach the sum of £2200 sterling per annum, including the rent of the agency; and Mr. *Morris* is compelled to make advances, either on account of general expenses or for other business, and he will be covered and secured by the stock of goods which shall be in his hands, and which M. *Delobbel-Flipo* binds himself shall not fall below 100,000 francs." The agency had been put an end to by the Defendant, M. *Delobbel-Flipo*; and the Defendant claimed the right to remove from the custody of the Plaintiff the goods which were in his hands at the determination of the agency, without satisfying the Plaintiff's claims in respect of expenses incurred by him as the Defendant's agent.

Buckley, Q.C., and *Rose-Innes*, for the Plaintiff, in support of the motion:—

The agreement in writing between the parties was not a document "whereby the holder or grantee has power to seize or take possession of any personal chattels comprised in or made subject to such" document, and consequently it is not a "bill of sale" within the meaning of the *Bills of Sale Acts*: *Ex parte Close* (1). It was in fact a security on goods from time to time in the actual possession of the grantee: a security which is perfectly valid without registration: *In re Cunningham & Co.* (2); *Ex parte Parsons* (3). The distinction between the present case and those in which it has been held that the document was a bill of sale, is that here the goods will have already come into the possession of the Plaintiff independently of the agreement before the security

(1) 14 Q. B. D. 386. (2) 28 Ch. D. 682.
(3) 16 Q. B. D. 532.

STIRLING, J. 1892 MORRIS v. DELOBBEL-FLIPO.

constituted by that agreement attaches to them; whilst in the other cases it has been the document itself which has entitled the grantee to take possession of the goods: *Ex parte Hubbard* (1); *Grigg* v. *National Guardian Assurance Company* (2). The case of *Mills* v. *Charlesworth* (3) will probably be cited on behalf of the Defendant; but it is distinguishable upon the ground that in that case there was no change in the possession of the goods, whereas here it is only upon goods which actually come into the Plaintiff's possession that his security takes effect. But, whatever may be the real nature of the document of the 26th of December, 1890, the terms of the agency were previously arranged between the parties, and the Plaintiff is entitled to shew what those terms were, and to hold the Defendant to them independently of the document.

Hastings, Q.C., and *Mulligan*, for the Defendant:—

The terms of the agreement between the Plaintiff and the Defendant having been reduced into writing, the written agreement is the sole evidence of those terms, and it is void under the *Bills of Sale Act*, 1882: *Ex parte Parsons* (4); *Newlove* v. *Shrewsbury* (5). This is not the case of a pledge of goods, like *In re Cunningham & Co.* (6) and *Ex parte Hubbard*, for the goods may not be in existence; it is a case of contract and the right is in Equity only: *Holroyd* v. *Marshall* (7). The agreement is a security which covers future chattels, and one "by which a right in Equity to personal chattels, or a charge or security thereon, is conferred," within sect. 4 of the Act of 1878: *Edwards* v. *Edwards* (8). It is also within sect. 9 of the Act of 1882: *Hughes* v. *Little* (9). Consequently, it is a bill of sale, and, not having been registered, it is void as against the Defendant.

[They also referred to *Mills* v. *Charlesworth* and *Marsden* v. *Meadows* (10).]

Buckley, in reply.

(1) 17 Q. B. D. 690.
(2) [1891] 3 Ch. 206.
(3) 25 Q. B. D. 421.
(4) 16 Q. B. D. 532, 542.
(5) 21 Q. B. D. 41.
(6) 28 Ch. D. 682.
(7) 10 H. L. C. 191.
(8) 2 Ch. D. 291.
(9) 18 Q. B. D. 32.
(10) 7 Q. B. D. 80, 86.

1892. March 11. STIRLING, J.:— STIRLING, J.

1892
MORRIS
v.
DELOBBEL-FLIPO.

This is a motion in which the facts have not been investigated so fully as is usual even in the case of motions; but the case has been argued at considerable length on a question of law which, it is contended, puts an end to the whole matter. [His Lordship then stated the facts, and continued:—]

The objection raised by the Defendant is, that the agreement on which the Plaintiff relies is void under the *Bills of Sale Act*, 1882.

It is contended on the part of the Plaintiff that, as the terms of the agency were verbally arranged between the parties before they were reduced into writing, the Plaintiff can rely upon those terms so agreed upon verbally apart from the document of the 26th of December, 1890. I think this contention cannot prevail. The terms of the agency have been reduced to writing, and, upon the principles laid down in *Ex parte Parsons* (1) and *Newlove* v. *Shrewsbury* (2), the written document is the only evidence of the agreement.

The document in question evidently is not a bill of sale in the ordinary acceptation of the term; but for reasons of public policy a very stringent enactment, as we know, has been passed by the Legislature with reference to bills of sale; and I am bound to give effect to that enactment if this document falls within its terms. The *Bills of Sale Act*, 1882, provides in sect. 3, that "the expression 'bill of sale,' and other expressions in this Act, have the same meaning as in the principal Act, except as to bills of sale or other documents mentioned in sect. 4 of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this Act shall not apply." That sends us back to the Act of 1878 to find what is a bill of sale; and two sections of that Act, viz., sects. 3 and 4, have been referred to. It is contended that the effect of sect. 3 is to narrow the meaning of the expression "bill of sale," as defined by sect. 4. I need not, at this stage, enter upon that. The 4th section of the Act of 1878 provides that, "In this Act the following words and expressions shall have the meanings in this section assigned

(1) 16 Q. B. D. 532, 542. (2) 21 Q. B. D. 41.

STIRLING, J. 1892 MORRIS v. DELOBBEL-FLIPO.

to them respectively, unless there be something in the subject or context repugnant to such construction." Then the section proceeds: "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." The ground on which it is alleged that this is a bill of sale and void under the Act is that it is an "agreement . . . . by which a right in equity to personal chattels, or to any charge or security thereon, is conferred."

Now, the construction of those words has been dealt with by the Court of Appeal in two cases. The first is the case of *Reeves* v. *Barlow* (1). There the question arose under a building contract, in which it was stipulated that "all building and other materials brought by the builder upon the land shall become the property of the landowner," and it was held that "that was not a bill of sale within the *Bills of Sale Act*, 1878." Lord Justice *Bowen*, in delivering the judgment of the Court, says (2): "The learned counsel for the Appellant contended that the previously exempted case of such building agreements was directly met by the new words which the Act of 1878 for the first time introduced into the interpretation clause, and that the present agreement must be registered as being an agreement by which a right in equity to personal chattels is conferred. On the part of the Respondent it was urged that a right to after-acquired property was not a right to personal chattels within the meaning of the Act of 1878. It is not necessary to pronounce an authoritative decision on this very grave point (as to which, see *per* Lord *Chelmsford*, *Holroyd* v. *Marshall*), because in our judgment whatever right is conferred by the clause of the building agreement now under discussion is not a right in equity at

(1) 12 Q. B. D. 436. (2) 12 Q. B. D. 441.

all, but a right at law. Down to the time when the building materials were brought upon the landlord's premises there was no contract relating to any specific goods at all, nor anything which could be subject to a decree for specific performance. The contract was only to apply to goods when brought upon the premises, and until this happened there was no right or interest in equity to any goods at all. Upon the other hand, the moment the goods were brought upon the premises the property in them passed in law, and there was nothing left upon which any equity as distinct from law could attach. No further performance of the contract was necessary, nor could be enforced. The builder's agreement accordingly was at no time an equitable assignment of anything, but a mere legal contract that, upon the happening of a particular event, the property in law should pass in certain chattels which that event itself would identify without the necessity of any further act on the part of anybody, and which could not be identified before."

The same point came before the Court of Appeal in *Ex parte Hubbard* (1), where goods were pledged as security for a loan and delivered to the pledgee, and then a document was signed by the pledgor recording the transaction and regulating the rights of the pledgee as to the sale of the goods. It was there held again that that was not a bill of sale within the *Bills of Sale Act*, 1882, and upon the question as to whether it conferred a right in equity, Lord Justice *Bowen* says this (2): "The answer is that these documents do not confer any right in equity, but only regulate the exercise of a legal right. I think that those words were intended to bring within the Act documents which create a right in equity as distinct from a right at law."

Now, it becomes necessary in that state of the decisions to inquire whether the document of the 26th of December, 1890, creates a right in equity as distinct from a right at law. For the Defendant it was contended that the right was in equity only, and *Holroyd* v. *Marshall* (3) was relied upon. That was a case in which a security was created on certain machinery, implements, and things specified in a schedule and fixed in a particular mill;

(1) 17 Q. B. D. 690. (2) 17 Q. B. D. 700.
(3) 10 H. L. C. 191.

STIRLING, J. 1892 MORRIS v. DELOBBEL-FLIPO.

and the securities contained a covenant that all the machinery, implements, and things which, during the continuance of the security, should be fixed or placed in or about the mill, in addition to or substitution for the said premises or any part thereof, should, during such continuance, be subject to the trusts, powers, provisoes, and declarations thereinbefore declared and expressed concerning the premises. The debtor who remained in possession sold and exchanged some of the old machinery, and introduced new machinery; but no assignment of such new machinery was executed, nor was any act done by or on behalf of the secured creditors, to constitute a formal taking of possession of the added machinery. Lord *Campbell*, when Lord Chancellor, reversing the decree of Vice-Chancellor *Stuart*, held that the machinery so added and substituted, remained the property of the debtor, and that an execution creditor of his was entitled in priority to those who claimed under the security. In the judgment, as reported in a note to the report of the case in the House of Lords, he says (1): "I am of opinion that, notwithstanding the equitable title of the plaintiffs to this property, as they had not perfected their title to it by any intervening act before possession taken under the execution, the judgment creditor is to be preferred. Till possession taken by the plaintiffs, they had only *jus ad rem*, the property remained in the judgment debtor, and the machinery was part of his goods and chattels liable to be taken under the *fieri facias*. My judgment rests upon Lord *Bacon's* maxim: '*Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio præcedens quæ sortiatur effectum, interveniente novo actu.*'" In the House of Lords, upon the second argument, that decision of Lord *Campbell's* was reversed, and the remarks of Lord *Chelmsford* in advising the House upon the question whether the right was in law or in equity seem to me to be very material. He says this (2): "At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed, is altogether void: *Robinson* v. *Macdonnell* (3). But where future property is assigned, and after it comes into existence, possession is either delivered by the

(1) 10 H. L. C. 194. (2) 10 H. L. C. 216.
(3) 5 M. & S. 228.

assignor, or is allowed by him to be taken by the assignee, in either case there would be the '*novus actus interveniens*' of the maxim of Lord *Bacon*, upon which Lord *Campbell* rested his decree, and the property would pass." He then discussed some cases at law, at all of which I have looked; and he cites this sentence from the judgment of Baron *Parke*, in the case of *Congreve* v. *Evetts* (1): "If the authority given by the debtor of the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods; but when executed not fully or entirely, but only to the extent of taking possession of the growing crops" (the subject of the bill of sale in that case), "it is the same, in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops."

Then Lord *Chelmsford* remarks that, in the case of *Hope* v. *Hayley* (2), Lord *Campbell*, C.J., said: "The intention of the contracting parties was, that the present and future property should pass by the deed. That could not be carried into effect by a mere transfer; but the deed contained a licence to the grantee to enter upon the property, and that licence, when acted upon, took effect independently of the transfer." Then, further on, Lord *Chelmsford* says this (3): "The judgment of Lord *Campbell* resting, as he states, upon Lord *Bacon's* maxim, determines that some subsequent act is necessary to enable 'the equitable interest to prevail against a legal interest subsequently *bonâ fide* acquired.' It is agreed that this maxim relates only to the acquisition of a legal title to future property. It can be extended to equitable rights and interests (if at all) merely by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law property, non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-

(1) 10 Ex. 298, 308. (2) 5 E. & B. 830, 845.
(3) 10 H. L. C. 219.

STIRLING, J. 1892 MORRIS v. DELOBBEL-FLIPO.

acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it." Therefore, the distinction which is drawn by Lord *Chelmsford* as to the legal and equitable right appears to be this, that an assignment or contract for value, of future property without possession, creates an equitable title only; but that, if possession is actually taken of the property when it comes into existence, then a legal interest is acquired.

The remarkable feature of the present case is that no right of any kind is created by the document to which I have referred in any goods unless and until they reach the hands of the Plaintiff *Morris*. The agreement between him and *Delobbel-Flipo* is one of agency. It therefore belongs to a class of contracts of which a Court of Equity would not decree specific performance. It confers no power to take possession of any goods; it merely entitles *Morris* to retain possession of goods when they come into his hands. Until the goods are delivered to *Morris*, there is no contract relating to any specific goods at all. If *Delobbel-Flipo* refused to send goods to *Morris*, the remedy of *Morris* would be in damages only, not by way of specific performance. But when the goods come to the possession of *Morris*, then, according to the distinction drawn in *Holroyd* v. *Marshall* (1) by Lord *Chelmsford*, there is a state of things, namely, an agreement coupled with possession, which gives rise to a legal right. It appears to me to give rise to no right in equity as distinguished from the right at law, and consequently, according to the principle laid down in *Reeves* v. *Barlow* (2), and *Ex parte Hubbard* (3), the document of the 26th of December, 1890, is not a bill of sale within the meaning of the Act of 1882.

The decision of the Court of Appeal in *Mills* v. *Charlesworth* (4) was much relied on on behalf of the Defendant. The head-note is this: "The owner of goods that had been seized under a *fi. fa.* agreed with the defendant that the latter should pay out the sheriff, that the goods should be pledged to the defendant as

(1) 10 H. L. C. 191.
(2) 12 Q. B. D. 436.
(3) 17 Q. B. D. 690.
(4) 25 Q. B. D. 421.

security for his advance, and that the sheriff's officer should hold the goods on behalf of the defendant." It was held by the Lords Justices *Lindley* and *Lopes*, Lord *Esher*, M.R., dissenting, that the document was not merely a record of the pledge, but was essential to the proof of the defendant's title to possession of the goods, and a bill of sale within the definition in sect. 4 of the *Bills of Sale Act*, 1878. It appears to me, however, that when the judgment of Lord Justice *Lindley* is carefully looked at, that decision rested upon this, that there was no physical change in the possession of the goods. That appears from these passages in his judgment. He says (1): "In this case, however, there was no physical change of possession of the goods. In point of law possession of goods may be changed by agreement without any physical change in their position or in the position of the person who actually guards them." Then, after saying that in his opinion that which took place "did amount in point of law to a change of possession of the goods," he goes on: "But the agreement by which this change in possession was effected was reduced into writing, and cannot be proved apart from the writing. Without the writing *Charlesworth* cannot prove his right to possess as against *Wilson*, the owner of the goods." Then, in conclusion, the Lord Justice says this (2): "If the decision in *Ex parte Hubbard* (3) is extended to cases of pledges created by agreement, and without any physical change in the custody of the goods, the *Bills of Sale Act* will become of little if any use."

It seems to me, therefore, that that decision, resting on the fact that there was no change in the possession of the goods, does not govern the present case. Here it is essential, in order that *Morris's* right may arise, that the goods should come into his possession—that is to say, that they should be physically in his hands. In my opinion, therefore, the document is not void as a bill of sale. The result of that, I suppose, must be, that the motion must go on in the usual way; but if it is desired that an order be drawn up, I will direct that to be done.

Solicitors: *H. Rose-Innes; W. Morley.*

(1) 25 Q. B. D. 425. (2) 25 Q. B. D. 426. (3) 17 Q. B. D. 690.

W. W. K.

STIRLING, J. 1892 April 30.

In re BOROUGH OF PORTSMOUTH (KINGSTON, FRATTON AND SOUTHSEA) TRAMWAYS COMPANY.

Company—Debenture-holder—Appointment of Receiver—Right to present Winding-up Petition—Statutory Powers of Public Advantage.

A tramway company incorporated in 1883 by Act of Parliament, in exercise of a power conferred upon them by their Act, issued debentures in the form prescribed by Schedule C to the *Companies Clauses Act*, 1845, which was incorporated in the special Act. The time for repayment of the principal owing upon the debentures had expired without its being repaid. A debenture-holder, who had brought an action to enforce his security, and had obtained the appointment of a receiver, presented a petition to wind up the company:—

Held, that the exercise of his remedy as a debenture-holder did not deprive him of his right as an ordinary creditor to present a winding-up petition, and that he was entitled to the order.

In re Herne Bay Waterworks Company (1), and *In re Exmouth Docks Company* (2), not followed.

PETITION.

The Borough of *Portsmouth* (*Kingston*, *Fratton*, and *Southsea*) *Tramways Company*, was incorporated in 1883 by the Act 46 & 47 Vict. c. clxxxvii. By sect. 13 of that Act, which incorporated the *Companies Clauses Consolidation Act*, 1845, the company had power to borrow money on mortgage; and in March, 1886, by virtue of that power, they issued debentures in the form prescribed by Schedule C to the *Companies Clauses Consolidation Act*, 1845. By these debentures the company, in consideration of the amount advanced, assigned to the debenture-holders the undertaking of the company, except calls on shares necessary for the completion of the authorized works and other requirements of the company, and all the tolls, and sums of money arising by virtue of their Act, and all the estate and interest of the company therein, to hold until the amount advanced, together with interest, should be satisfied. The principal moneys secured upon the debentures were made payable on the 1st of March, 1891.

By a further Act passed in July, 1887, the company obtained

(1) 10 Ch. D. 42. (2) Law Rep. 17 Eq. 181.

additional borrowing powers, under which, in September, 1887, they issued thirty second mortgage debentures for £100 each, which constituted a charge upon the property and undertaking of the company for the time being. The principal moneys secured by these debentures were made payable on the 1st of September, 1890. No payments had been made to the debenture-holders in respect of principal, and the whole of the principal sums secured by both series of debentures still remained due and payable by the company. By sect. 14 of the company's original Act, the holders of debentures issued by the company had power to enforce payment of arrears of interest or principal due upon their security by the appointment of a receiver.

This was a petition presented under the *Companies Acts*, 1862–1890, by a holder of debentures of both series asking for an order to wind up the company. In 1890 the Petitioner had brought an action on behalf of himself and all the holders of 1st and 2nd debentures against the company to enforce his security, and on the 20th of June, 1891, he had obtained judgment by which it was declared that the Petitioner and the other debenture-holders were entitled to stand in the position of judgment creditors of the company for the principal sums due upon the debentures, and the arrears of interest thereon. He had also obtained the appointment of a receiver; but his judgment debt still being unsatisfied, he, on the 3rd of August, 1891, presented this petition to wind up the company. The hearing of the petition at first stood over, and, in the meantime, on the 9th of February, 1892, a summons was taken out in the action with the object of obtaining an order for the sale of the tramways and other property and effects comprised in the company's undertaking. On the hearing of the summons in Chambers, Mr. Justice *Stirling*, being doubtful whether, the company not being in liquidation, he had jurisdiction to make such an order, directed the summons to stand over pending the hearing of the petition which was now brought on.

Hastings, Q.C., and *Bradford*, for the Petitioner.

Warrington, for the company, did not oppose the petition.

STIRLING, J.

1892

In re BOROUGH OF PORTSMOUTH (KINGSTON, FRATTON AND SOUTHSEA) TRAMWAYS COMPANY.

Birrell, for the holders of twenty-one out of the thirty second debentures, and for shareholders:—

The special Act of the company provides the means for the enforcement of the security created by the debentures, viz., the appointment of a receiver. The Petitioners are not therefore entitled *ex debito justitiæ* to a winding-up order: *In re Herne Bay Waterworks Company* (1); *In re Exmouth Docks Company* (2). There has been no case in which these decisions have been questioned: *Buckley* on Companies (3). The debentures are akin to those of a railway company, and the case is governed by the law applicable to such undertakings. The company has statutory powers which were conferred for the public advantage, and it ought not to be within the power of creditors to seize and break up the undertaking. The Plaintiff's rights are determined by his debentures, and he is in no better position having regard to his judgment than any other debenture-holder. By bringing his action, the Plaintiff has selected his tribunal, and his remedy is limited to the relief he has obtained in that action, viz., the appointment of a receiver. There will be no assets available for distribution in the winding-up, and under the circumstances the Court will hesitate to set in motion the expensive process of liquidation under the Companies Acts.

Hastings, in reply:—

A tramway company is not a railway company within the exception of sect. 199 of the *Companies Act*, 1862: *In re Brentford and Isleworth Tramways Company* (4). The Petitioner having recovered judgment, this case is not covered by *In re Herne Bay Waterworks Company*. But the authority of that case may be doubted, having regard to the decision of *North*, J., in *In re Barton-upon Humber* and *District Water Company* (5). Whatever the Petitioner's rights are in respect of his debentures, he is an unsatisfied judgment creditor, and as such entitled to a winding-up order. It would be absurd to say that his rights are less than those of an ordinary trade creditor.

(1) 10 Ch. D. 42.
(2) Law Rep. 17 Eq. 181.
(3) 6th Ed. p. 213.
(4) 26 Ch. D. 527.
(5) 42 Ch. D. 585.

STIRLING, J. (after stating the facts, continued):— STIRLING, J.

1892

In re BOROUGH OF PORTSMOUTH (KINGSTON, FRATTON AND SOUTHSEA) TRAMWAYS COMPANY.

Sect. 199 of the *Companies Act*, 1862, provides that any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members, and not registered under the Act, may be wound up under the Act. It has been expressly decided by *Bacon*, V.C., in *In re Brentford and Isleworth Tramways Company* (1), that a tramway company is not a railway company within the exception in sect. 199 of the Act of 1862, and that decision has been followed by other judges of this Division. It must be taken, therefore, that there is jurisdiction to wind up this company under the Act of 1862. The company being indebted to the Petitioner who has obtained judgment for his debt, and there being jurisdiction to wind it up, the question is, why should not that jurisdiction be exercised? Mr. *Birrell*, on behalf of certain debenture-holders and shareholders, asks me to abstain from exercising it, on the ground that if I were to do so, I should be going contrary to the decision of *Malins*, V.C., in *In re Herne Bay Waterworks Company* (2). In that case the company was an unregistered company incorporated by Act of Parliament in 1867. By that Act it was provided that the company should be at liberty to borrow on mortgage, that the mortgagees of the company might enforce payment of the arrears of interest or principal by the appointment of a receiver; and that all moneys to be borrowed on mortgage under the Act, and the interest for the time being thereon, should have priority against the company, and all the property from time to time of the company, over all other claims on account of any debts to be incurred or engagements to be entered into by them. The mortgages issued by the company were in the form prescribed by the *Companies Clauses Consolidation Act*, 1845, which was incorporated with the Act of 1867. The company failed to pay the interest on the mortgage debt, and then a bill was filed by the petitioners against the company for an account of what was due on their mortgage, and for a decree for payment of the amount, and the appointment of a receiver. The case came on before the Master of the Rolls, who appointed a receiver, and ordered certain

(1) 26 Ch. D. 527. (2) 10 Ch. D. 42.

STIRLING, J. 1892 *In re* BOROUGH OF PORTSMOUTH (KINGSTON, FRATTON AND SOUTHSEA) TRAMWAYS COMPANY.

accounts and inquiries. It is to be observed that in that case judgment was not formally recovered against the company, and in that respect it differs from the present one. The receiver passed his account, from which it appeared that there were no funds in hand out of which the principal and interest due to the petitioners could be paid; and, subsequently, there being a considerable sum then due to them, they presented their petition. The Vice-Chancellor said this (1): "When the money was advanced what had the proposed lenders to look to? In my opinion they were bound to look to the fact that they were lending money to establish a public object sanctioned by Act of Parliament, and were, therefore, only entitled to that remedy which the Act gives, and that is, the appointment of a receiver. . . . Beyond that, the lenders have no security whatever." And further on, he said: "I think the case comes within the principle of *In re Exmouth Docks Company* (2), in which I was guided to a great extent by the rules laid down by Lord *Cairns* in *Gardner* v. *London, Chatham, & Dover Railway Company* (3); and that these petitioners have lent their money on the security which the Act of Parliament gives them, namely, the appointment of a receiver, and with that security they must be content. Consequently this petition to wind up the company cannot be sustained, and must be dismissed with costs." With the utmost respect I confess that I cannot quite follow the reasoning of the Vice-Chancellor in that case. No doubt a person who comes to enforce a security cannot get anything more than his security gives him, and I take it to be decided that a debenture in the form of those now in question gives the holder no greater security than the undertaking, as defined in *Gardner* v. *London, Chatham & Dover Railway Company*. That is to say, all the creditor can get from his security is the fruit of the undertaking as a going concern; he cannot pull the undertaking to pieces, or break it up, so as to avail himself of the separate parts towards satisfaction of his debt. In the present case the Petitioner does not come to enforce his security, but as a judgment creditor of the company. It is admitted that an ordinary creditor of a company might present a petition to wind

(1) 10 Ch. D. 47. (2) Law Rep. 17 Eq. 181.
(3) Law Rep. 2 Ch. 201.

up the company, and obtain an order upon it. I fail to see why a debenture-holder, whose debt is payable and who has exhausted all his remedies except a winding-up petition without obtaining payment of his debt, should be in a worse position than an ordinary creditor who has got no security upon the undertaking. It seems to me that the remedy given to him to enforce his security upon the undertaking as a going concern, does not deprive him of his remedy as a creditor who has obtained a judgment for his debt, but cannot obtain payment. It was also said that the company ought not to be wound up because the preamble of the Act, by which it was incorporated says that the construction of the tramway would be to the public advantage. That objection has been met by the decision of Mr. Justice *North*, in *In re Barton-upon-Humber and District Water Company* (1). I see no way in which the Petitioner can enforce payment of his debt other than a winding-up order; so I make the order.

Solicitors; *Sutton, Ommanney, & Rendall; Goldring, Mitchell, & Philips; Ford & Ford.*

(1) 42 Ch. D. 585.

G. A. S.

KEKEWICH, J.

1892

April 12.

In re KNIGHT. KNIGHT *v.* GARDNER.

[1879 K. 30.]

Solicitor — Lien — Costs — Property recovered or preserved—23 & 24 *Vict.* c. 127, *s.* 28 [*Revised Ed. Statutes, vol. xiii., p.* 881]—*Priority of Lien as between successive Solicitors.*

The principle of *Cormack* v. *Beisly* (1) and *In re Wadsworth* (2), that the solicitor last employed in an action is entitled to a charge for costs under 23 & 24 Vict. c. 127, sect. 28, in priority to his predecessor, is unaffected by *North* v. *Stewart* (3).

Semble, where a receiver of rents has been appointed in an action and a new receiver is afterwards appointed in his place, the solicitor by whom such last-mentioned appointment was obtained is entitled to priority of lien against any rents subsequently received.

In an action for general administration of the real and personal estate of a testator who died intestate as to certain real estate, a person who claimed to be the heir-at-law obtained leave to attend. The Chief Clerk, by his certificate, found that another person was the heir-at-law; but the Judge found in favour of the claimant, and his decision was affirmed on appeal. In the course of the action the claimant changed his solicitors several times, the three solicitors last employed being *A.*, *B.*, and *C.*, successively. Of these *A.* was employed during the most active and costly period of the litigation, *B.* was employed previously to the certificate of the Chief Clerk, and thenceforth until shortly after notice of the appeal was given, and *C.* was employed for the purpose of the appeal only. *A.* and *B.* obtained charging orders under 23 & 24 Vict. c. 127, s. 28; but such orders reserved the prior rights, if any, of *C.* There was a fund in Court representing rents of the real estate descended, but such fund was insufficient for payment of the costs owing to *A.*, *B.*, and *C.*:—

Held, applying the principle above referred to, that *C.* was entitled to be paid his costs out of the fund in Court, in priority to *B.* and *A.*, and *B.* in priority to *A.*

THIS was an action commenced by originating summons for the administration of the real and personal estate of a testator who died intestate as to part of his real estate.

John Sutton Page, who claimed to be heir-at-law of the testator, obtained leave to attend the proceedings in the action. By the judgment the usual inquiry was directed as to the heir-at-law, and

(1) 3 De G. & J. 157. (2) 34 Ch. D. 155.
(3) 15 App. Cas. 452.

the answer to the inquiry involved matters of pedigree of considerable difficulty and intricacy. The Chief Clerk, by his certificate, dated the 21st of April, 1887, found against the claim of *John Sutton Page;* but, on the hearing of the action on further consideration and a summons to vary the certificate, the finding of the Chief Clerk was, on the 19th of July, 1887, reversed by Mr. Justice *Kay*, who found that *John Sutton Page* was the heir-at-law (1). On the 25th of August, 1887, notice of appeal was given; and on the 17th of May, 1888, the Court of Appeal affirmed the decision of Mr. Justice *Kay*.

John Sutton Page, during the course of the action, changed his solicitors several times, the solicitor last employed being Mr. *Langley Smith*, in substitution for Messrs. *Eyre & Co.*, who were preceded by Mr. *William Sutton Page*. On the hearing of the action in Chambers, on second further consideration before Mr. Justice *Kekewich*, a question was argued as to the rights and priorities of the solicitors so employed to payment of their costs out of a fund in Court representing the rents of the real estate which descended to the heir-at-law. The further facts of the case appear from the statement contained in the judgment of his Lordship, to which it is only necessary to add that the charging order of the 19th of June, 1889, therein referred to, was in fact made subject to the reservation indicated by his Lordship.

Ashton Cross, appeared for Mr. *Langley Smith*.

Benjamin Eyre, and *L. H. Jenkins*, for Messrs. *Eyre & Co.* and *William Sutton Page*, respectively.

April 12. KEKEWICH, J.:—

The fund which is the subject-matter of this application falling short of the demands upon it, the parties were unwilling, and I could not properly urge them, to have the summons adjourned into Court. On the other hand, the points raised are of such interest, importance, and difficulty that I have thought it right to deliver a considered judgment, for which open Court, and not Chambers, is the proper place. The question to be decided is

(1) The case is noted W. N. (1887) 156.

KEKEWICH, J.

1892

In re KNIGHT. KNIGHT *v.* GARDNER.

in what order certain solicitors are entitled to be paid their costs out of the fund, on which it is admitted they all have claims. The following facts and dates are taken from a chronological statement which, in the absence of agreement between the parties, was settled at my request by the Chief Clerk. There are many beyond those which I am about to state, but they seem sufficient for the present purpose. The fund in Court consists of, first, the remainder of a sum of £680 paid in by trustees in July, 1879, and representing the rents of real estate of which *Edward Knight*, the testator in the action, died intestate; and secondly, the surplus rents from time to time paid into Court by the receiver in the action. I am not aware that, as regards the claims against the fund, any distinction has been or can be made between the two constituent parts; but I understand that that secondly mentioned is of comparatively small amount. The action was commenced in 1879 for the general administration of the estate of *Edward Knight*, who died in 1857, and an administration judgment was made by consent on the 3rd of May, 1879. A receiver of the rents and profits of the real estate was appointed on the Plaintiff's application on the 19th of February, 1880. On the 7th of July, 1881, *John Sutton Page*, who ultimately succeeded in establishing his title as heir, obtained an order to attend, Messrs. *Hamlin & Grammer* being his then solicitors. It is said that these gentlemen were the *London* agents of *William Sutton Page*, of whom more hereafter, and appeared in that character; but the fact seems to be immaterial. On the 1st of December, 1881, Messrs. *Hamlin & Grammer* were displaced in favour of Mr. *Fox*, who again gave way to Mr. *De Caux* on the 26th of April, 1882. This gentleman acted only until the 25th of October, 1882, when *William Sutton Page* became the solicitor of *John Sutton Page*. This state of things lasted for about two years, during which time there were several proceedings in the action. On the 12th of November, 1884, there was another change, Messrs. *Eyre & Co.* succeeding *William Sutton Page* as solicitors for *John Sutton Page*. On the 22nd of February, 1886, *William Sutton Page* charged his claim for costs with £250 in favour of one *C. A. Page*, who subsequently charged the security thus obtained in favour of Messrs. *Eyre & Co.*; and on the 25th

of February, 1886, *William Sutton Page* further charged his claim for costs with £140 in favour of Miss *Jolley*. In the next year the inquiries directed by the Judge were completed and the Chief Clerk's certificate made, finding one *Knight* to be heir-at-law. This finding was varied by Mr. Justice *Kay*, who declared *John Sutton Page* to be heir-at-law. His decision was affirmed on appeal, pending which another, and the last, change of solicitors took place, Mr. *Langley Smith* succeeding Messrs. *Eyre & Co.* on the 19th of October, 1887. On the 4th of November, 1887—that is, after this last change, and while the appeal was still pending—*William Sutton Page* obtained a charging order. It declares him to be entitled to a charge upon the real estate, and upon the surplus income thereof, from the 11th of October, 1878, for his taxed costs, charges, and expenses of and in reference to the proceedings in the action as the solicitor of *John Sutton Page*. But the declaration is expressed to be made without prejudice to the question whether Messrs. *Eyre & Co.* are entitled to a prior charge for their costs, charges, and expenses as solicitors for *John Sutton Page*. At a later date, namely, on the 19th of June, 1889, which was after the hearing of the appeal, Messrs. *Eyre & Co.* also obtained a charging order. It is not with the papers before me; but I understand it to have been made subject to Mr. *Langley Smith's* claim in respect of the costs of the appeal.

Under these circumstances, there are three claimants of the fund: first, Mr. *Langley Smith*, who came into the action for the purposes of the appeal only; secondly, Messrs. *Eyre & Co.*, who were displaced by him, and acted from the 12th of November, 1884, to the 19th of October, 1887; and thirdly, *William Sutton Page*, who was solicitor from the 25th of October, 1882, to the 12th of November, 1884—the most active and costly period of the litigation. I do not notice the other solicitors, and they were not noticed in argument, it being reasonably clear that nothing can in any event be coming to them. Those claiming under charges made by *William Sutton Page* cannot be in any better position than himself, and for the purpose of decision I consider their claims as merged in his, though they have to be worked out on the distribution of the fund. The Chief Clerk was of opinion that, according to the rule laid down by Vice-Chancellor

KEKEWICH, J.
1892
In re KNIGHT. KNIGHT v. GARDNER.

Wood in *Cormack* v. *Beisly*, reported on appeal in 3 De G. & J., where the statement of the rule is set out on page 162, and expounded and followed by Mr. Justice *Kay* in *In re Wadsworth* (1), Mr. *Langley Smith*, as the solicitor conducting the proceedings at the date of ultimate success, was entitled to the first charge; that Messrs. *Eyre & Co.*, whose period of command most nearly approached that critical point, came next; and that Mr. *William Sutton Page*, notwithstanding his meritorious services, must be postponed to both.

The arguments before me turned on the question whether *In re Wadsworth* was applicable, and several points were made. It was urged in support of Messrs. *Eyre & Co.'s* claim that a solicitor's common law lien does not affect real estate, and *Shaw* v. *Neale* (2) was cited. The point was there decided (3) briefly, and before argument on behalf of the respondent of the rest of the case, but after it had been fully argued for the appellant. But the decision seems to have no application to the present claims, which are concerned with what is no doubt the produce, that is, income, of real estate, but exists in the form of a fund in Court recovered by means of the proceedings in the action. Then it was said that *In re Wadsworth* must be taken to have been overruled by the decision of the House of Lords in *North* v. *Stewart* (4), and that the rights of the claimants must be governed by the charging orders independent of common law lien. The question falling for decision in *North* v. *Stewart* was whether a judgment for costs obtained by Colonel *North* in the Queen's Bench Division against one *Welch*, a domiciled Scotchman, could be arrested, according to Scotch process, as the foundation of jurisdiction in *Scotland* against Colonel *North*, and the House of Lords decided that it could, on the ground that it was Colonel *North's* judgment, and therefore arrestable as against him, and not the judgment of his solicitor. This is clearly stated in the address of the Lord Chancellor to the House, and otherwise appears on a perusal of the report. In discussing the case, some of the learned Lords who took part in the decision offered remarks on the law affecting the relative positions of solicitor

(1) 34 Ch. D. 155.
(2) 6 H. L. C. 581.
(3) 6 H. L. C. 592.
(4) 15 App. Cas. 452.

and client as regards costs, and Lord *Watson* said (1): "The opinions expressed by the English Bench in *Hough* v. *Edwards* (2) and *Mercer* v. *Graves* (3) appear to me clearly to shew that, in the Courts of Common Law, a solicitor's lien upon costs decreed does not, until it is converted into a charge by virtue of the statute, prevent their attachment by other persons having claims against the judgment creditor." The two cases here mentioned shew that Lord *Watson* could not have intended, any more than I think the House or the other learned Lords could have intended, to overrule *In re Wadsworth* (4), which was not cited, and the principle of which did not come in question. They are cases dealing with the rights of outside claimants—that is, of persons claiming, as, for instance, under a garnishee order against both solicitor and client—and do not touch the relative rights of several solicitors of one client all claiming as against him. In my opinion, therefore, the authority of *Cormack* v. *Beisly* (5) and *In re Wadsworth* is unaffected by the decision in the House of Lords.

Some other cases were referred to, and especially *Faithfull* v. *Ewen* (6); but they deal with considerations other than those arising here, and I need not further notice them.

Perhaps I ought to mention, just to shew that it has not been forgotten, that on the 30th of July, 1889, Mr. *Langley Smith* obtained an order for the appointment of a new receiver. This would, I conceive, give him priority of claim against any rent received after that date; but as the result of my judgment is to give him priority as against the entire fund, this is immaterial. I hold that the order in which these gentlemen are entitled to be paid their costs out of the fund in Court is, first, Mr. *Langley Smith*; secondly, Messrs. *Eyre & Co.*; and thirdly, Mr. *William Sutton Page*. I further think that these gentlemen must add their costs of the application to those otherwise due to them in the action, so that these likewise will be paid in the same order.

Solicitors: *G. L. P. Eyre & Co.; Trinder & Capron; C. T. Courtney Lewis.*

(1) 15 App. Cas. 463.
(2) 1 H. & N. 171.
(3) Law Rep. 7 Q. B. 499.
(4) 34 Ch. D. 155.
(5) 3 De G. & J. 157.
(6) 7 Ch. D. 495.

UNIVERSITY OF LONDON
Burlington Gardens, LONDON, W.

C. A.
1891
STIRLING, J.
July 9, 14, 15, 16; *Aug.* 5.
C. A.
1892
May 17, 18.

BARING *v.* ABINGDON.

[1889 B. 2892.]

Manor—Rights of Common—Ancient Arable Land—Customary Freeholds—Release of Seignorial Rights—General Words in Conveyance.

Prior to the 12th of August, 1859, the Plaintiff was entitled to a customary estate in fee simple in a piece of ancient arable freehold land held of the lord of a manor at a quit rent, heriot, and relief, and as owner and occupier was entitled to the rights of common enjoyed by the freehold tenants of the manor.

On the 12th of August, 1859, the lord of the manor enfranchised and released the piece of land to the Plaintiff in fee, discharged from all quit rents, heriots, reliefs, and other services of free tenure:—

Held, by *Stirling*, J., that although rights of common annexed to copyholds are extinguished on enfranchisement, there is no similar doctrine with reference to the extinguishment of rights of common on the release of seignorial rights in ancient arable lands of customary freehold tenure, and accordingly that the Plaintiff's rights of common had not been extinguished by the enfranchisement.

This decision was not appealed from.

The lord of the same manor sold to the Plaintiff in 1859 a piece of land forming about one-fifth part of a farm which was part of the demesne lands of the manor, and conveyed it to him, "together with all ways, . . . commons, and all other rights, members, and appurtenances to the said piece of land, or any part thereof belonging." The farm had for many years been in the occupation of lessees, who uniformly and extensively exercised rights of common over the wastes of the manor. On the completion of the sale, the tenant of the farm, whose lease had not expired, gave up by arrangement possession of the piece of land to the purchaser, who paid him the value of his tillages; but it did not appear that any formal surrender or assignment was made. The lease was not mentioned in the conveyance:—

Held, by the Court of Appeal (affirming the judgment of *Stirling*, J.), that the Plaintiff had no right of common in respect of this piece of land, for that inasmuch as the land was part of the demesnes of the manor, no right of common was attached to it, the lord and his tenants having enjoyed common by virtue of the lord's ownership of the waste; that in the absence of any special relation between the parties, the words used were insufficient to create a right of common; and that *Doidge* v. *Carpenter* (1), where similar words in a grant were held to create the right, did not govern the present case, as in that case the grant was a grant by the lord of the whole farm to the tenant, and the intention was necessarily

(1) 6 M. & S. 47.

to be inferred that the tenant should take in perpetuity whatever he had enjoyed under his lease, whereas here the grant was only a grant of part of the land to a stranger.

C. A. 1892

BARING v. ABINGDON.

THIS was an action by which the Plaintiff sought to establish rights of common over the waste lands of the manor of *Banstead*, in respect of certain lands of which he was the owner. The waste consisted of four commons, detached from each other, and known as *Banstead Downs*, *Park Down*, *Burgh Heath*, and *Banstead Heath*. The Defendants had become the owners of the soil of *Banstead Downs* and *Banstead Heath*, but not of that of the other commons. The rights of common over these wastes had already been the subject of litigation in *Robertson* v. *Hartopp* (1).

One of the properties in respect of which the Plaintiff claimed rights of common was a piece of land consisting of 53A. 27P., called the *Hooks*, and numbered 1 on a plan annexed to the pleadings. This land down to 1859 was part of the demesne lands of the manor. Part of it before 1824 was included in the *Manor Farm*, the whole of which was part of the demesne lands, and of which in 1809 the then lord of the manor granted a lease for twenty-one years to *Samuel Pritchard*, who, in 1818, assigned it to *William Steer*. In 1824, the then lord demised the rest of the *Hooks* and some other land to *William Steer* for seven years from Michaelmas, 1823. In 1830 a fresh lease of all the land in *Steer's* occupation was granted to him from Michaelmas, 1830, for twenty-one years. On the 7th of November, 1856, a lease of all the lands formerly held by *William Steer* was granted to his son, *George Steer*, from Michaelmas, 1856, for twenty-one years, determinable at seven or fourteen years. The leases expressly included all rights of common belonging or appertaining to the lands demised.

George Steer, in his evidence, stated that he remembered his father, *William Steer*, coming in 1818 to the *Manor Farm*; that his father as soon as he came there began to keep sheep, which were regularly turned out on the wastes of the manor from May to December. He remembered his father taking in 1824 some further land, consisting of the *Hooks*, to the extent of thirty-one acres and twenty acres of common fields towards *Banstead Downs*,

(1) 43 Ch. D. 484.

C. A. 1892 BARING v. ABINGDON.

and these were used in the same way as the other parts of the farm. He said that *William Steer*, when he got these further lands, increased his flock from 150 to 200 or 220, and went on turning out on the wastes in the same way, only in larger numbers. One flock of sheep was kept on the farm, which was cultivated on the four-course system, and the flock was folded from year to year in various parts of the farm as the state of the cultivation required. When the flock was folded on a part of the farm near *Banstead Downs*, it was turned out there; when on a part of the farm near *Park Down* the flock was turned out there; and when it was folded on or near the *Hooks*, it was always turned out on *Park Down*, not on *Banstead Downs*. This state of things appeared to have continued down to the end of 1858; and there was evidence that the successive tenants had from 1809 exercised a right of common over all the wastes.

By an indenture, dated the 27th of January, 1859, reciting an indenture of the 21st of November, 1853, by which the manor of *Banstead*, and divers lands, were conveyed to *William Parke* in fee, in trust for *Thomas Alcock* in fee, subject to the leases and agreements for leases and tenancies therein mentioned, and subject to the payment of one-half of a rent-charge of £40, the other moiety of which was payable by the owners of the manor of *Walton* and other hereditaments; and reciting another indenture of the same date, by which *Parke* conveyed the premises in the first-recited indenture to uses to bar dower in favour of *Alcock*; and reciting an indenture of the 11th of December, 1854, by which the *Banstead* moiety of the £40 rent-charge was made primarily payable out of a certain specified part of the hereditaments comprised in the indentures of 1853, and another indenture of the 20th of December, 1854, modifying the last indenture: "And whereas the said *T. Alcock* is seised in fee of the hereditaments hereinafter assured or intended so to be, and hath contracted with the said *T. H. Maudslay* for the sale to him of the said hereditaments and premises for an estate of inheritance in fee simple in possession free from incumbrances except as herein expressed, for the price or sum of £3190;" it was witnessed that *Parke*, according to his estate in the premises and by the directions of *Alcock* granted, and *Alcock*

granted and confirmed to *Maudslay*, his heirs and assigns, the above 53A. 0R. 27P., "all which premises are now or late in the occupation of —— *Steer*, as tenant thereof to the said *T. Alcock*, together with all ways, waters, water-courses, trees, woods, underwoods, hedges, ditches, fences, commons, and all other rights, members, and appurtenances whatsoever to the said piece or parcel of land and hereditaments hereinbefore described or referred to, or any part thereof belonging, and the reversion and reversions, remainder and remainders, yearly and other rents and profits of the said hereditaments hereby assured or intended so to be: And all the estate, right, title, interest, benefit, claim, and demand whatsoever at law or in equity of the said *T. Alcock* and the said *W. Parke* respectively of, in, to, out of, or upon, the said hereditaments hereby assured, or intended so to be, To have and to hold the said hereditaments hereby assured, or intended so to be, but subject nevertheless to the payment of the said moiety or half part of the said perpetual rent-charge of £40 per annum, so far as the said hereditaments are or may be still liable to the payment thereof, but with the full benefit nevertheless of the hereinbefore in part recited indentures of the 11th and 20th days of December, 1854, as an indemnity against the same," unto and to the use of *Maudslay*, his heirs and assigns, for ever. *Alcock* entered into covenants for title in the common form, with no reference to rights of common or to the lease to which the property was subject.

Under an arrangement between *George Steer* and *Maudslay*, *Steer*, on the completion of *Maudslay's* purchase, gave up possession of the *Hooks* to him, and *Maudslay* on the 29th of January, 1859, paid him the value of his tillages.

There was some evidence of sheep having been turned out from the *Hooks* upon *Park Down* after the purchase, but no evidence that they had been turned out on *Banstead Downs* or *Banstead Heath*, or that any rights of common over *Banstead Downs* or *Banstead Heath* had been enjoyed by *Maudslay*, or his successors in title.

Another of the properties in respect of which the Plaintiff claimed rights of common was a piece of ancient arable freehold land consisting of 5A. 3R. 38P., called *Bottom Close* or *Lime Kiln*

C. A. 1892 BABING v. ABINGDON.

Field, adjoining *Park Down*, and numbered 2 on the plan annexed to the pleadings, which was held by *Maudslay* in fee as a customary freehold of the lord of the manor of *Banstead* at a quit rent, heriot, and relief, and was subsequently enfranchised by the lord. The facts with reference to this piece of land will be found in the judgment of Mr. Justice *Stirling*.

In 1889 the Plaintiff, who was the successor in title of *Maudslay* as regarded the *Hooks* and *Bottom Close*, brought this action to establish his title to rights of common over the commons and waste lands of *Banstead* in respect of the *Hooks*, *Bottom Close*, and various other lands, and for an injunction to restrain the Defendants from digging turves, loam, sand, gravel, or other material forming the surface of the waste lands so as to interfere with any of the rights of common, and for damages.

The present report relates only to the *Hooks* and *Bottom Close*.

The action came on for hearing before Mr. Justice *Stirling* on the 9th of July, 1891.

Hopkinson and *Blennerhassett*, for the Plaintiff.

Hastings, Q.C., and *Butcher*, for the Defendant.

Hopkinson, in reply.

1891. Aug. 5. STIRLING, J. (stated the facts of the case with reference to the *Hooks*, and continued) :—

It was suggested—I will not say argued—that as the lands conveyed by the deed of the 27th of January, 1859, were, at the date of it, demesne lands of the manor, and were then first severed from the manor, *Maudslay* became entitled to common of pasture for cattle, levant and couchant, on the lands conveyed, just as he would under an ancient grant of the same lands. Then it was admitted that no authority could be produced in support of such a contention. It was laid down as far back as the 26th year of King *Henry* VIII., in a case which is reported as case 15 in the Year Book for Trinity Term of that year, that common appendant cannot be created by a modern grant, and this proposition, as far as I can discover, has been accepted as law

ever since. I am unable, therefore, to adopt this suggestion. At the same time, and in the same case, it was also laid down that common appurtenant may be created by a modern grant, and the cases of *Sacheverell* v. *Porter* (1); and *Cowlam* v. *Slack* (2), are more recent authorities to that effect. The exact nature and extent of the right created depends upon the true construction of the grant.

Now, on the construction to be placed in the absence of special circumstances upon the deed of 1859, there is a recent and high authority. In the case of *Hall* v. *Byron* (3), Vice-Chancellor *Hall* had to consider the effect of a grant by a lord of the manor of a farm held of the manor—"Together with all houses, outhouses, edifices, buildings, fixtures, barns, stables, yards, gardens, orchards, roads, ways, paths, passages, waters, watercourses, hedges, ditches, fences, lands, meadows, feedings, commons, and all commonable rights, timber and other trees, woods, underwoods, liberties, advantages, rights, members and appurtenances whatsoever, actual and reputed, to the said messuages, lands, hereditaments, and premises hereinbefore conveyed or intended so to be belonging or in anywise appertaining therewith, or with any part thereof, held, used, and enjoyed." There as in the present case, there was not at the date of the deed any right of common appendant or appurtenant to the farm. The Vice-Chancellor remarks that there was no evidence of enjoyment or reputation of right of common at the date of the conveyance. Consequently, as I understand him, there was no foundation for holding that the right claimed was conferred by the words "common or commonable rights actual or reputed, or therewith held, used and enjoyed." These words being eliminated, there remained to be considered the effect of the words "common and commonable rights belonging or appertaining thereto." Those words are very similar to the words which are to be found in the deed of 1859 in this case. The Vice-Chancellor says (4): "I have not been able to come to the conclusion that, by means of the general words in question, common rights were re-created. Several cases were referred to by the

(1) W. Jones, 396.
(2) 15 East, 108.
(3) 4 Ch. D. 667.
(4) Ibid. 672.

C. A. 1892 BARING v. ABINGDON. Stirling, J.

plaintiffs' counsel as authorities that such common rights were re-created, but they were cases of a special character, being cases under Inclosure Acts, and it has been considered in some of those cases that the decisions are to be referred to the special character and provisions of such Acts. There are many cases upon the construction of deeds which were not referred to, but which are authorities adverse to the plaintiffs' contention. Of these I may mention *Bradshaw* v. *Eyre* (1); *Worledge* v. *Kingswell* (2); *Clements* v. *Lambert* (3); and *Marsham* v. *Hunter* (4). It seems significant that the words 'or heretofore or at any time heretofore,' which are part of the general words given by Mr. *Davidson* in his ordinary form of a conveyance, are left out in a case where they were specially appropriate if it was intended to re-create rights of common." These sentences exactly express the opinion which I have formed upon the conveyance of 1859; and I desire to adopt them as part of my judgment in the present case.

It was said, however, that although the general words, if read according to their primary meaning, might not be sufficient to confer the right that is claimed; yet they are, as is shewn by, among other cases, the recent decision in *Thomas* v. *Owen* (5), easily susceptible of a secondary meaning. It was said that the surrounding circumstances in the present case shew that they ought to be read in the deed of 1859, in accordance with such secondary meaning. It was contended that the evidence established actual user of the common rights claimed from 1824 to 1859, and also subsequently to the year 1859. However, in the case of *Clements* v. *Lambert* (which is one of the cases referred to by Vice-Chancellor *Hall*), it was proved by the plaintiff (the trial taking place in the year 1807) that there had been "sixty or seventy years user of the common by the inhabitants of his house, the *Swan Inn*." In that case the defendant "proved that in 1781, *Edward Thornycroft*, from whom he derived title to himself, was seised in fee as well of the *locus in quo*, being part of the waste of the manor of *Stockwell*, as of the plaintiff's

(1) Cro. Eliz. 570.
(2) Ibid. 794.
(3) 1 Taunt. 205.
(4) Cro. Jac. 253.
(5) 20 Q. B. D. 225.

house and land, and in that year conveyed the latter to one *Robertson* (under whom the plaintiff derived title), together with all commons, common of pasture, advantages, hereditaments, and appurtenances whatsoever, thereto belonging or in anywise appertaining." The question was whether the plaintiff was entitled to the right of common, which at the date of the deed had been extinguished by unity of possession; and it was held, notwithstanding the enjoyment which extended over sixty or seventy years, and consequently must have been proved for some forty or fifty years, before 1781, and for twenty years afterwards, that the deed could not operate as a new grant.

I think, therefore, that the construction of the deed of 1859 is not affected by such user as was proved. What, however, was mainly relied upon was the existence at the date of the conveyance of the lease to *Geo. Steer*, of the 7th of November, 1856; and it was contended that in judging of the intention of the parties to the deed of the 27th of January, 1859, that circumstance must be taken into consideration. Singularly enough that lease is not mentioned in the conveyance, although the conveyance appears to be carefully drawn; the land is not expressed to be granted subject to, but with the benefit of, the lease; although such language is found with reference to a rent-charge and deed of indemnity. On the face of the deed the property is dealt with as if that lease had not existed, and did not exist.

It was not necessary that any formal instrument should be executed for the purpose of putting an end to that lease. It is established by *Davison* v. *Gent* (1) and other cases, that the granting of a new lease by a lessor to a stranger, with the assent of the lessee, will operate as a surrender of the old lease. The evidence of *Geo. Steer* appears to me to shew that, contemporaneously with the sale by *Alcock* to *Maudslay*, some arrangement was come to for putting an end to the lease without any instrument of surrender being executed; and under these circumstances it seems to me that I ought not to infer that the parties to the conveyance of 1859 intended that the rights of

(1) 1 H. & N. 744.

C. A. 1892 BARING v. ABINGDON. Stirling, J.

Maudslay, the purchaser, should be governed or affected by the lease of 1856, or any right conferred by it or enjoyed under it. In my opinion, the claims of the Plaintiff in respect of the lands numbered 1 on the plan have not been established.

I now proceed to deal with the parcel numbered 2. This contains 5A. 3R. 38P., and is known as *Bottom Close*, or *Lime Kiln Field*, and adjoins *Park Down*. In a survey of the manor made in 1680, this parcel is found to be held freely of the manor, and is described as a parcel of arable land. It was conveyed, and passed as freehold from that time down to the 25th of July, 1859, when it was conveyed by deed of that date to *Thomas Henry Maudslay* in fee.

By an indenture dated the 12th of August, 1859, and made between *Thomas Alcock* of the one part and *Thomas Henry Maudslay* of the other part, after reciting that *Alcock* was seised of the manor of *Banstead* in fee simple, and that *Maudslay* was seised of, or absolutely entitled to, the customary fee of and in free tenure premises held of the manor thereinafter described and thereby enfranchised and their appurtenances, and held the same of the lord of the manor by the yearly quit-rent of 2*s.* 6*d.* heriot of a best beast on death, and also a relief of 2*s.* 6*d.* on death or alienation, and that *Alcock* had agreed for the enfranchisement of the said free tenure premises and the extinguishment of the said quit-rent heriot and relief, for the sum of £44, it was witnessed that in consideration of that sum *Alcock* did thereby grant, enfranchise and release unto *Maudslay*, his heirs and assigns, the parcel of land in question, together with all the timber and other trees, woods, mines, quarries, commons, ways, rights, franchises, royalties, easements, and advantages belonging thereto, and all the seignorial estate and interest of *Alcock* in the premises to hold the same unto and to the use of *Maudslay*, his heirs and assigns, as freehold, thenceforth discharged from all quit-rents, heriots, reliefs, and all other services of free tenure. All that estate and interest of *Maudslay* has become vested in the Plaintiff.

The first question is whether this parcel is made out to be ancient arable freehold land; and upon the evidence before me I come to the conclusion that it is. *Primâ facie*, therefore, the

Plaintiff as owner and occupier of it is entitled to the rights of common to which the freehold tenants of the manor were by the judgment of the Court of Appeal in *Robertson* v. *Hartopp* (1) declared to be entitled.

Since the execution of the deed of the 12th of August, 1859, this land has however ceased to be held of the manor, and it was contended that it followed as a consequence that the rights of common had been extinguished. In support of this reliance was placed in the first instance on the law which is established with respect to copyholds, namely, that by enfranchisement any rights of common previously existing are extinguished. The leading case on this point of law is that of *Massam* v. *Hunter*, which is reported in various places, but is, I think, best reported in *Yelverton's* Reports (2), Sir *Henry Yelverton* himself having been counsel in the case. It is very short, and is put in this way. "A copyholder of a messuage and two acres of land in fee, the lord grants and confirms the messuage of land *cum pertinentiis* to the copyholder in fee; if he to whom the confirmation was made had by usage, as copyholder, common in the wastes of the lord, yet the copyhold being by this confirmation extinct and enfranchised he shall not have the common there now; for the words *cum pertinentiis* will not create a common; for the common first used was gained by custom and annexed to the customary estate, and is lost with it, the common not being of its proper nature incident to the copyhold estate, but a collateral interest gained by usage." The reason, therefore, of the loss is that the common is not of its proper nature incident to the copyhold estate, but a collateral interest gained by usage.

Now, as regards freeholds it is settled, as laid down in *Tyrringham's Case* (3), that common appendant was in ancient times a thing necessary and incident to the feeoffment of arable land to be held of the manor in common socage. Therefore the ground on which the extinction of the right of common annexed to a copyhold depends, does not apply. Moreover, although the law is clearly stated with regard to the extinguishment of rights of common annexed to a copyhold on enfranchisement, I have

(1) 43 Ch. D. 484.
(2) Page 189.
(3) 4 Rep. 36 b.

C. A. 1892 BARING v. ABINGDON. Stirling, J.

been unable to find any trace of a similar doctrine with reference to the extinguishment of rights of common on the release of seignorial rights. This subject is discussed in sect. 479 and 480 of *Littleton's* Tenures and Lord *Coke's* Commentary thereon. It is said in sect. 479, "But releases which enure by way of extinguishment against all persons are, where he to whom the release is made, cannot have that which to him is released. As if there be lord and tenant, and the lord release to the tenant all the right which he hath in the seigniory, or all the right which he hath in the land, &c., this release goeth by way of extinguishment against all persons, because that the tenant cannot have service to receive of himself." Sect. 480 is this: "In the same manner is it of a release made to the tenant of the land of a rent-charge or common of pasture, &c., because the tenant cannot have that which to him is released, &c.; so such releases shall enure by way of extinguishment in all ways." Now Lord *Coke's* comment upon that is this: "First, of the lord and tenant, and the lord release to the tenant his seigniorie—this must of necessity enure by way of extinguishment to all men; for the tenant cannot have service to be taken of himself, nor can one man be both lord and tenant. The second is of a rent-charge, a man cannot have land, and a rent issuing out of the same land; thirdly, a man cannot have land and a common of pasture issuing out of the same land, *et sic de cæteris.* For in all these cases and the like he to whom the release is made cannot have and enjoy the thing that is released." There is, however, nothing to prevent a man having land, and a common of pasture appendant or appurtenant thereto issuing out of other land, and consequently the reasoning of *Littleton* and *Coke*, I think, does not apply.

Passing on to a very recent decision, I find that Sir *George Jessel* in the case of *Commissioners of Sewers* v. *Glasse* (1) said (2): "If a man grants an acre of land in consideration of a grantee covenanting to perform certain services, and if some years afterwards the grantor chooses to release the services, that does not enable him to take back the land from the grantee. Nor would it enable him to take back a right of common." In my opinion,

(1) Law Rep. 19 Eq. 134. (2) Law Rep. 19 Eq. 158.

therefore, the Plaintiff has made out his title to the rights which he claims in respect of parcel No. 2.

W. W. K.

The Plaintiff appealed as to so much of this decision as related to the *Hooks*. The appeal came on for hearing on the 17th of May, 1892.

Hopkinson, Q.C., *Blennerhassett*, and *Sillem*, for the Appellant:—

We do not claim the right of pasture on the waste as appendant to the land granted by the lord, but as appurtenant to it. The lord by virtue of his ownership of the waste had a right of pasture over it, limited by the right of common of the tenants of the manor. This right of the lord passed with the land to his lessee in 1809, and was in fact enjoyed by him and the succeeding tenants till the conveyance to *Maudslay*, under whom we claim, and *Maudslay* paid the valuation for the tenant's interest. These facts must be taken into consideration in construing the grant of the freehold. The right of common was actually "belonging" to the land at the time of the grant, and there was no other common to satisfy the words. The *Hooks* was entirely an arable farm, and the right of pasture for sheep kept on the farm was a necessity. The general words of the grant were therefore sufficient to pass the common as appurtenant, or to create it, if it did not exist before: *Thomas* v. *Owen* (1); *Bayley* v. *Great Western Railway Company* (2); *Doidge* v. *Carpenter* (3); *Hall* v. *Byron* (4); *Cowlam* v. *Slack* (5); *Sacheverell* v. *Porter* (6). *Hall* v. *Byron* does not govern this case, for there the evidence did not shew enjoyment of the common at the time of the conveyance, a fact which is dwelt upon by the Vice-Chancellor (7), and, moreover, the property had been copyhold. Now, as to the construction of the deed, we have in the general words "commons, &c., to the said piece or part of ground belonging." "Belonging" may easily have a secondary meaning. In *Hill* v. *Grange* (8) where land was mentioned as appertaining to other land,

(1) 20 Q. B. D. 225.
(2) 26 Ch. D. 434.
(3) 6 M. & S. 47.
(4) 4 Ch. D. 667.
(5) 15 East, 108.
(6) W. Jones, 396.
(7) 4 Ch. D. 672.
(8) Plowd. 164, 170.

C. A. 1892 BARING v. ABINGDON.

"appertaining" was construed "usually occupied with," and the same principle was applied to a right in *Thomas* v. *Owen* (1). That principle applies here still more strongly; the intention was to pass all rights which had been usually enjoyed with the land conveyed. The lord's right to send out beasts on the waste is popularly regarded as a right of common. The judgment is fallacious in taking each circumstance separately and deciding that because each by itself is insufficient the aggregate is so: the whole must be looked at together.

[KAY, L.J.:—*Barlow* v. *Rhodes* (2) is against you.]

Doidge v. *Carpenter* (3) closely resembles the present case and is in our favour; the lord there granted to the tenant the freehold reversion expectant on a lease, with general words like those in the present case, and the grantee was held entitled to the same rights over the waste as he had enjoyed under the lease. The intention here was to pass all the rights actually enjoyed. *Ewart* v. *Cochrane* (4) shews that rights reasonably required for the enjoyment of the property will pass though not strictly necessary and though the exercise of them is not visible and continuous. *Arundell* v. *Viscount Falmouth* (5) shews that the lord may be considered as having a *quasi* right of common in respect of the demesne lands. The same view was taken in *Musgrave* v. *Inclosure Commissioners* (6). This right could pass under the general words.

[LINDLEY, L.J.:—The right of common was exercised in respect of the whole farm of which this land only formed a part. How does it appear that any right of common was enjoyed in respect of this land?]

The right is to be apportioned among the different parts of the farm: *Sacheverell* v. *Porter* (7).

Hastings, Q.C., and *Butcher*, for the Respondent:—

There was no right of common annexed to the farm at the

(1) 20 Q. B. D. 225.
(2) 1 C. & M. 439.
(3) 6 M. & S. 47.
(4) 4 Macq. 117.
(5) 2 M. & S. 440.
(6) Law Rep. 9 Q. B. 162.
(7) W. Jones, 396.

time of the grant, and if the grant is to be interpreted by user, the Plaintiff's case fails. He is claiming in respect of the *Hooks* a right of common over *Banstead Downs* and *Banstead Heath*, but sheep have never been turned out from the *Hooks* on either of those commons, only on *Park Down*. On the construction of the grant of 1859, it is to be noticed that no mention is made of *Steer's* lease, so it cannot be inferred that all which had been enjoyed under it was intended to pass. There was no right of common at the time, and "with commons belonging" will not create a right if it did not exist: *Barlow* v. *Rhodes* (1); *Saundeys* v. *Oliff* (2). *Doidge* v. *Carpenter* (3), on which the Appellant relies, is distinguishable—in a grant of the fee to the tenant, it was to be inferred that it was intended to give him in perpetuity whatever he had enjoyed under his lease. *Thomas* v. *Owen* (4) has no application here. There is no apparent right necessary for the enjoyment of the property. The lease to *Steer* cannot be treated as existing when the grant was made—it was manifestly a part of the arrangement at the time that it should be surrendered as regards the *Hooks*, and whether it was actually surrendered just before or just after the grant makes no difference: *Davison* v. *Gent* (5); *Nickells* v. *Atherstone* (6). If not surrendered at law before the grant, it was surrendered in equity, so *Doidge* v. *Carpenter* cannot apply.

Hopkinson, in reply.

LINDLEY, L.J.:—

Before I proceed to refer to the facts of this case I wish to express our acknowledgments to Mr. *Hopkinson* for the very clear and able way in which he has dealt with an extremely difficult case.

The question which we have to consider is, What are the rights of the Plaintiff, who claims under a deed of grant of the 27th of January, 1859, from the lord of the manor of *Banstead* and his trustees? The wastes of the manor of *Banstead*

(1) 1 C. & M. 439.
(2) Moor. 467.
(3) 6 M. & S. 47.
(4) 20 Q. B. D. 225.
(5) 1 H. & N. 744.
(6) 10 Q. B. 944.

C. A. 1892 BARING v. ABINGDON. Lindley, L.J.

consisted at the date of this grant of four commons—*Banstead Heath, Banstead Downs, Park Down*, and *Burgh Heath*. Those commons did not adjoin each other, but were scattered in various parts of the manor. The grantors were *Thomas Alcock*, the lord of the manor, and his trustee; the grantee was Mr. *Maudslay*. I pass over the recitals, for beyond shewing what is tolerably obvious, that the deed was carefully prepared by a conveyancer, I do not think that they throw any light upon the points which we have to consider. The grant is of "all that piece or parcel of land, formerly divided into several closes, situate at *Banstead*, containing by recent survey fifty-three acres." Then the boundaries are given with a reference to a plan, and the deed goes on: "All which said premises are now or late were in the occupation of —— *Steer*, as tenant thereof to the said *Thomas Alcock*, together with all ways, waters, watercourses, trees, woods, underwoods, hedges, ditches, fences, commons, and all other rights, members, and appurtenances whatsoever to the said piece or parcel of land and hereditaments hereinbefore described or referred to, or any part thereof belonging." Now, bearing in mind who the grantor was, and who the grantee was, we have to consider what passed under these general words. I do not understand that the introduction of general words in a grant amounts to a warranty by the grantor that there is anything to answer them. I understand them to be put in for an entirely different object—to cover anything which may not have been specifically mentioned, to sweep in anything which may have been overlooked, and they may, if not in all cases, certainly in the great majority of cases, be read as if the words "if any" were added to them. There is no warranty that there are any ways, commons, or other things belonging or appertaining to the piece of land conveyed; there may or may not be, and if there are the grantee is to have them. Now, when we look at the position of affairs as regards this property, we find that there is nothing accurately answering the description of commons belonging to this piece of land. The grantor is the lord of the manor; he is granting what he has got to grant; but he has not got, although he has power to create, a right of common belonging to the particular parcel of land which he purports to grant. That particular piece of

land was a portion of a larger farm held by a gentleman of the name of *Steer*, under a lease dated in 1856, which was unexpired; and under a succession of leases from 1809 down to 1856, Mr. *Steer*, and those who had held this farm before him, had enjoyed certain rights of common in respect of the whole farm over all the wastes of the manor. Whether that enjoyment began as of right under the lease of 1809, which is the first of which we have any knowledge, or whether there was a right of common attached to this land by some previous grant or lease by more apt words than we find in the lease of 1809, I do not know; but the evidence shews that, from 1809 down to the time of the grant to *Maudslay*—at all events, down to the end of the year 1858—the lessee of this larger farm had exercised rights of common over all the wastes.

Now, the exact state of the evidence upon that part of the case cannot, I think, be put better than it is in a passage which I will read from Mr. Justice *Stirling's* judgment. [His Lordship here read *Steer's* evidence as given above:—]

Pausing there for a moment, and disregarding a material circumstance which I will consider presently, I mean the negotiations which took place between *Maudslay* and *Steer*, and looking at *Maudslay* as a purchaser unconnected with *Steer*, the first question is, What passed to *Maudslay* under the terms of this grant? Now, bearing in mind what the state of things was, and bearing in mind the language used, it appears to me that there is not one decision, but a series of decisions, which shew conclusively that but for the peculiar position in which *Maudslay* stood to *Steer*, these words would not be sufficient either to pass or to create a right of common in respect of this particular tenement. The cases to which I refer are very numerous. I will only mention *Whalley* v. *Tompson* (1); *Clements* v. *Lambert* (2); *Barlow* v. *Rhodes* (3); *Hall* v. *Byron* (4). The law upon the subject is expressed shortly, but I believe very accurately, in *Gale* on Easements (5), in a short passage which I will read. "General words, such as 'appertaining, belonging,' &c.,

(1) 1 Bos. & P. 371.
(2) 1 Taunt. 205.
(3) 1 C. & M. 439.
(4) 4 Ch. D. 667.
(5) 3rd Ed. p. 77.

C. A. 1892 BARING v. ABINGDON. Lindley, L.J.

have been held in numerous instances, both with regard to rights of common and of way, to be insufficient to pass the right upon a severance of the tenements; but a conveyance containing the words 'used, occupied, and enjoyed,' has been held to be sufficient." He cites a number of cases, including those to which I have referred. As regards rights of way, I would merely observe in passing that the immediately preceding passage in that book has been somewhat modified by more recent decisions, beginning with *Kay* v. *Oxley* (1) and coming down to the present time, to the effect that if there is a visible road obviously used by a person over land of his own for the enjoyment of his house, and he grants that house, a right of road may pass, although it did not exist as a right distinguished from ownership before the date of the grant. It is impossible to invoke that class of cases here, for it cannot be said that on an inspection of the parcels there is anything visible which stands in the same position as a visible road, without which the property cannot be enjoyed. The mere fact that there are here several parcels of waste puts an end to any argument of that kind. If it is said that it is necessary to enjoy pasture over one particular piece of the waste, the question immediately arises why that piece, rather than any other piece. We need not therefore consider such cases as *Thomas* v. *Owen* (2). Looking then only at the state of the property, and disregarding as I say the peculiar position of *Maudslay* and *Steer*, supposing that *Maudslay* was a mere purchaser of this land without having any arrangement with *Steer*, it appears to me that we should be running counter to the authorities if we were to hold that there was sufficient in this language to create or to pass the right which is claimed by the present Plaintiff. Nor is there, so far as I know, any single case which is contrary to our view, and I doubt very much whether Mr. *Hopkinson* would have contended that the right passed but for the peculiar position of *Maudslay*.

Now *Maudslay's* position was this. We do not know exactly what the facts were, but we know them approximately. He evidently wanted possession from *Steer* of this particular portion

(1) Law Rep. 10 Q. B. 360. (2) 20 Q. B. D. 225.

of *Steer's* farm of which this close was not much more than one-fifth, and some arrangement had been made by *Maudslay* with *Steer* to the effect that *Steer* should go out of possession and let *Maudslay* in. There was not, so far as we know, any assignment by *Steer* of his lease to *Maudslay* in respect of this particular property, nor was there anything more than an arrangement by which, in consideration of so much money paid by *Maudslay* to *Steer*, *Steer* went out and let *Maudslay* in. That being the case, it appears to me that there is great difficulty in pressing the case of *Doidge* v. *Carpenter* (1) to the extent to which Mr. *Hopkinson* desires it to be pressed. It was a case of this description. There had been a lease of the farm, and there was a right of common enjoyed by the lessee over the property of the person who ultimately conveyed the reversion to him, and the conveyance of the reversion was couched in these words, the lessor granted the reversion of the whole of the property in lease to the tenant with the words "common belonging or in anywise appertaining." It was urged that there was in strictness no common belonging or in anywise appertaining to the farm. What Lord *Ellenborough* said was in substance this: Although there was no right of common which could be transferred, the intention of the parties, as is obvious from their position, must have been to create and confer upon the grantee that right of common which in fact he had been enjoying, and which would come to an end by the merger of his lease in the reversion unless the words "belonging or in anywise appertaining" are construed as equivalent to "actually used and enjoyed." It is quite obvious that the intention would have been defeated by the purest technicality if the Court had not construed the deed in the way in which it did, for, considering the position of the parties, their object clearly was, not to destroy the grantee's rights of common, but to continue them for ever. The position of the parties here and the state of things is such as to my mind by no means to force us to the same inference of fact as in *Doidge* v. *Carpenter*. The distinction is obvious and very important. The grantee in this case is not the tenant, he only made an arrangement with the tenant to go out and give him possession. In addition to that, the property

(1) 6 M. & S. 47.

C. A. 1892 BABING v. ABINGDON. Lindley, L.J.

in respect of which this right is assumed to be created is not the whole but a comparatively small portion of the property held by the tenant, which is a distinction of considerable importance when the Court draws inferences of fact and regards the intention of the parties. Then there is this striking circumstance, that although *Steer*, who went out in favour of *Maudslay*, certainly did enjoy rights of common over all the wastes in respect of his whole property, when we come to look at what he did we find that all the sheep which were folded upon the particular property he was to give up to *Maudslay*, were depastured, not on the common on which the Plaintiff now claims pasture, but on another common. Bearing that in mind, and bearing in mind the very strong evidence of user before the grant, and bearing in mind, what is most important, I think, in construing ambiguous general words, the usage from 1859 downwards (usage which goes to shew that the right now claimed has never been enjoyed), it strikes me that it would be a very strong thing to infer that *Alcock* and *Maudslay* when they executed this deed intended that *Maudslay* should have the right which is now claimed. I confess that the inference I draw is diametrically the opposite, that it never entered the mind of either party that *Maudslay* was bargaining for, or that *Alcock* was granting, any such right. Subsequent usage is entirely against the existence of the right, and the usage beforehand is not so much in its favour as to overcome the very strong impression which the other usage leaves; and if we were to put upon these words the construction that is contended for by Mr. *Hopkinson*, instead of being satisfied, as in *Doidge* v. *Carpenter* (1) the Court was, that we were giving effect to the intention of the parties, I am convinced that we should be doing just the contrary, and that the real truth of the matter is this, that the right of common which is claimed was never dreamt of in 1859 when the deed was executed.

Under those circumstances it appears to me that I am not driven by *Doidge* v. *Carpenter*, or any other case, or by any principle of law, or by the facts, to decide what I think would be contrary to the intention of the parties. In my opinion the appeal fails, and must be dismissed.

(1) 6 M. & S. 47.

BOWEN, L.J.:—

I am of the same opinion.

The case really turns upon the deed of 1859 as read by the light of the surrounding circumstances. The general words in the deed are words of the merest generality, and are not apt words to describe such a right as is claimed. Although, if the right already existed, the words might be effectual to pass it, it seems to me that such ambiguous words as these cannot be held to create it, when we see that for thirty-three years subsequently the deed has been interpreted in a sense different from that for which the Appellant contends.

Now, that being the short ground upon which the case seems to me to turn, I will, out of respect to the extremely able argument of Mr. *Hopkinson*, say a few words in expansion of that view. In order to decide the case, it is necessary to construe the deed of January, 1859, and in particular to construe the words which accompany the conveyance of this piece of land forming part of what was the *Manor Farm*. The piece of land is conveyed to *Maudslay*, under whom the Appellant claims: "Together with all ways, waters, watercourses, woods, underwoods, hedges, ditches, fences, commons, and all other rights, members, and appurtenants whatsoever to the said piece or parcel of land and hereditaments hereinbefore described or referred to, or any part thereof belonging." Now, can any student of law at this time of day maintain for a moment that general words like these imply the existence of some antecedent right? They are spread broadcast over all conveyances. Would any one like to lay a wager that there were rights of watercourses attached to this piece of land, because "watercourses" occur among the general words? It is clear that, although these general words are efficacious enough to pass a right if it exists, the use of them does not import that there is such a right existing. Mr. *Hopkinson's* argument must therefore, in order to succeed, make good one of two positions, either that there was a previous existing right, which these words aptly describe, so as either to continue it, or to speak more accurately, to re-create it or create it *de novo* by reference to the past; or, secondly, that if there was no such previous existing right which these words could accurately describe, there was

C. A. 1892 BARING v. ABINGDON. Bowen, L.J.

such a state of circumstances that a grant of this parcel of land must necessarily either involve in itself a grant of right of common upon this particular waste, *Banstead Heath*, or at all events must be accompanied by the implication of a concurrent grant to that extent and to that effect, which comes to the same thing.

Now, first of all, was there any previous existing right which these words aptly describe so as to recreate it? If there was an existing right, what was it? It was a right, if any, created between the landlord, the lord of the manor, in 1809, and in the subsequent years, and his tenants; a right created by the deed of lease, the general words of which would receive that interpretation when read by the light of the user. There is ample user to justify the view, I think, that under those leases a right of common as appurtenant to the farm, in the limited sense of the term appurtenant, was granted to the tenant to enure for his benefit, and for the convenient enjoyment of the demised farm during the period of the demise; not a right created so as to be appurtenant to the lands at common law in the hands of any one to whom they might pass, but a conventional right as between the landlord and the tenant as long as the tenancy subsisted. The tenant had in fact under his lease, as against his lord, the absolute power of putting his sheep within the limits of levancy and couchancy upon the wastes of the manor, and of obtaining estovers for the comfortable enjoyment of his premises.

Now, did that right exist at the time of the grant of January, 1859, or had it been extinguished? If it had been extinguished then these words could not refer to it. They were not apt words to refer to an extinct right though they might cover an existing right. You could not describe that which did not exist as a right which belonged to the particular premises. The law upon that subject is clear. I will only mention again the cases of *Barlow* v. *Rhodes* (1); *Clements* v. *Lambert* (2); *Saundeys* v. *Oliff* (3); *Whalley* v. *Tompson* (4). The evidence appears to me to leave it very uncertain whether this right was extinguished or not at the time of the grant, and I for one shall not attempt to

(1) 1 C. & M. 439.
(2) 1 Taunt. 205.
(3) Moor. 467.
(4) 1 Bos. & P. 371.

decide this case upon the ground that at the date of this grant of 1859 the right had been clearly extinguished; but I remark again that it was only a right which existed as between landlord and tenant. Do these words aptly describe such a right? Certainly not. They may be wide enough to cover it, but they are certainly not the proper words. The right between the landlord and tenant, even if it be in the nature of a right appurtenant to the enjoyment of the farm, and to be measured by the levancy and couchancy of the cattle, was, nevertheless, a right which belonged to the whole farm. Here, if it is spoken of at all, it is spoken of as a right which belonged to the severed portion. Such language, therefore, is not apt to describe that particular right, though I do not say that it might not pass it. It is sought by Mr. *Hopkinson* to justify the use of the language by the application of the doctrine of apportionment, and he says with perfect truth, that in the case of alienation to a stranger, common, whether appendant or appurtenant, will pass with a parcel of the entire estate to the enjoyment of which the common was originally attached. That law, as it was said by Lord *Coke*, was necessary in the interests of the commonwealth to be laid down, otherwise common would have been extinguished all over the country by the alienation of land. The case of *Sacheverell* v. *Porter* (1), and *Wyat Wild's Case* (2), shew that this is the law. But there is a manifest fallacy in applying the doctrine of apportionment so as to force the construction of this deed. This is not a case where the owner of the whole of a property to which rights of common are attached alienates part of that property, in which case, under general words such as these, the common appurtenant which was necessary for the reasonable enjoyment of the parcel would pass according to the case of *Sacheverell* v. *Porter*, and *Wyat Wild's Case*. This is an instance of a lord who by a subsisting lease had bound himself to the tenant to give that tenant during his lease the right to pasture his sheep upon a particular common, granting to a stranger with general words a parcel of the land of which he at the moment was reversioner. It is clear that this is not at all strictly a case of apportionment.

Mr. *Hopkinson* endeavoured to support the view for which he

(1) W. Jones, 396. (2) 8 Rep. 78 b.

C. A. 1892 BARING v. ABINGDON. Bowen, L.J.

was arguing by referring to *Doidge* v. *Carpenter* (1). I will state shortly the nature of that case. There was a tenant of the lord of the manor who was entitled to a right of common appurtenant created in his favour by his lease for the reasonable enjoyment of the demised premises. During his tenancy, and whilst he was enjoying this right as against his landlord, he took from the landlord a conveyance in fee of the entire property of which he was the tenant. The words of the conveyance were words which granted the premises with all commons thereto belonging or in anywise appertaining. The tenant under that deed claimed, and the Court ultimately allowed him, the right to go on possessing under those general words of grant the right of common which he had previously enjoyed under the lease. It was sought to defeat his claim upon the ground that there was a merger, and that there was no existing right, because the right was destroyed by the conveyance, and the words of conveyance were not words which would create a new right. The tenant, who had a lease which gave him a right of common, bought the reversion of the lease, and it was contended that by that conveyance, although there were words which purported to convey the rights of common which existed, he was not to have as much in fee as he had originally under his lease. It would be a most outrageous injustice if it were so. But the law of *England*, which is generally good sense, found its way out of that technicality, and rightly decided—upon the ground of reason, I think—that, having regard to the relation of the parties, and to the circumstances of the case at the time, no other construction could rightly be put upon the words contained in the grant than that the parties intended that there should be created in favour of the tenant, who was thenceforward to be the owner in fee, the same right of common with respect to the premises as he enjoyed before, there being words in the deed which were sufficient to point to the intention of the parties that the right of common which already existed should go on existing. The deed had to be read by the light of the surrounding circumstances, and those circumstances made it clear to demonstration what the intention of the parties was.

(1) 6 M. & S. 47.

The present case is totally different. It is not a case of a grant in fee to the tenant, with words importing that he was to go on enjoying what he had already. It is a commonplace grant to a stranger of a parcel of a farm. In looking to see what the true intention of the parties was, it must be observed first of all that this is a grant to a stranger, and secondly, a grant not of the entire farm, but of a bit carved out of the farm. Can it possibly be said that, from the relations of the parties or the justice of the case, there is any necessity to suppose that they must have intended the right of common to go on existing, and existing not in its old shape, because the right of common in its old shape was appurtenant to the entire farm, but as re-apportioned to the parcel of land which was the sole subject-matter of this conveyance. I do not say that the language of this grant might not have passed the right of common under a different state of circumstances, but I do say that there is nothing in the circumstances of the case which shew that this language must pass it. The language is left obscure, vague, and ambiguous. It might possibly have passed such a right if it was shewn to be the intention of the parties that it should. But what additional facts have we to throw light upon the question? We have this, that for thirty-four years from the time of the conveyance, the grantee never ventured to use this right, which is now dug up after such delay. The circumstances at the time were not such that the parties themselves could be supposed to have intended these words to have any specific application. If, indeed, they were words so specific that you could not account for their existence in the deed except upon the supposition that there must be some subject-matter to which they applied, the Court would search round about and find what would be the most reasonable subject-matter to which to apply them. But the words are not such as to justify the supposition that there must be something to which they correspond. On the contrary, as has been pointed out, they are words of the greatest obscurity and vagueness, and, having regard to the non-user for thirty-four years, when once you find they are not apt words—that they are words which you would have to strain, and words which no conveyancer who knew his business would use in order to convey such a right

C. A. 1892 — BARING v. ABINGDON. — Bowen, L.J.

—it seems to me that the true construction is not that put by Mr. *Hopkinson*, but by the Respondents.

I add one more fact which seems to me to support that conclusion, although the words on which Mr. *Hopkinson* relies refer to rights belonging to this parcel of land. If you are to measure the right by the user of that date, there was no user of *Banstead Downs* as connected with the enjoyment of this particular portion of the farm. It is difficult, therefore, to infer an intention to create a right of common in favour of this close over *Banstead Downs*, though I agree with Mr. *Hopkinson* that if, at the time of the grant, a right of common had existed as regards the whole of the farm, these words would be sufficient to carry a portion of the common with them for the purpose of the enjoyment of the grant of the alienated parcel.

Mr. *Hopkinson's* second argument was this—if you look at the surrounding circumstances you ought to infer that the deed with these words, possibly even without these words, created a right of common over *Banstead Downs* as being reasonably necessary for the enjoyment of the alienated parcel of land. If such a right exists, it arises either from words in the deed expressly creating it, or by implication from the words of the deed, or it may arise as it seems to me by implication from the surrounding circumstances taken in connection with the deed. In whichever way you look at it, if you could find either in the deed, or from the surrounding circumstances and the deed together, a clear intention of the parties that the right of common should go with the land, then Mr. *Hopkinson* might succeed. But surely he is pressing too far the principle that the grantor must not derogate from his own grant, and that when a grant has been executed, the surrounding circumstances may shew that it must have been the intention of the parties that a particular license or concession should accompany the express grant, when he seeks to apply it to a case like this. The case of continuous apparent easements has been sometimes called an exception from the general law, but I doubt whether it is strictly an exception. It seems to me to be only an illustration of the principle. Where you find a formed road which is obviously and visibly laid out for the purpose of rendering the enjoyment of a particular house or land

more feasible, the right to enjoy the formed road passes by implication, certainly when there are words capable of passing it, and I see no reason to think that it would not pass in a similar case without any words at all. I am not at all certain that it is a right which arises upon the deed itself, and that it does not arise from the circumstances outside the deed and the deed together. We are dealing however with a case not of easements but of alleged rights of common. To invoke a principle of the law of easements for the purpose of applying it to a right of common, is to employ it about a subject-matter which is not necessarily identical. And to say that it is obvious that the grantor of the deed of 1859 must be taken to have granted this common, because this common on *Banstead Downs* was reasonably necessary for the complete enjoyment of the granted parcel, seems to me to be applying the doctrine to a case in which the reason of the thing does not admit of its application. If you could shew in any particular case that it was necessary for the reasonable enjoyment of the grant of land that some right of common should be treated as attached to it, then the principle of law might apply; but it would be very difficult if not impossible to make out such a case, and certainly it is not made out here. So far from its being true that the reasonable exercise of the right of common on *Banstead Downs* is necessary for the complete enjoyment of the granted premises, the contrary is clear. Never were sheep turned out on *Banstead Downs* from these premises, but only on *Park Down*, which is close by them. The case, therefore, cannot be brought upon its facts within any of the cases where the principle that the grantor cannot derogate from his own grant, has been held to apply.

For these reasons—reasons slightly different from those given in the Court below—it appears to me that this appeal fails.

KAY, L.J.:—

I agree with the other members of the Court in thinking that this appeal must be dismissed. The claim is not to an easement. It is a claim to a right of common on certain detached pieces of waste belonging to the manor of *Banstead*. That is a very different kind of right from a mere easement. It is a claim to a

C. A. 1892 BARING v. ABINGDON. Kay, L.J.

profit à prendre upon the wastes of the manor of *Banstead*, which wastes it is admitted were not in any sense part of the thing granted. The property granted is some fifty-three acres of land originally part of the demesne lands of the manor. To that land, speaking now of the estate in fee simple of that land, there never was any right of common attached. The lord, as owner of the manor, had of course a right to depasture cattle on his own waste, and his right could be called a right of common, only because in the exercise of it he could not be allowed to overstock the common so that those who had rights of common, properly so called, upon it would be deprived of those rights. But except in that sense the lord had no right of common on the waste, and certainly such right as he had was not attached to the demesne lands. He would have had that right if he had no demesne lands whatever. Therefore, as I say, to this land, speaking now of the fee simple interest in the land, there never was at any time previously to the deed of 1859 any right of common attached.

Then we have to construe the deed of 1859. At that time, and for very many years previously, the lord of the manor had been accustomed to let this land as part of a farm, about five times as large, and to permit his own tenants of this part of the demesne lands to pasture the cattle which were levant and couchant upon their farms on the different portions of the wastes of the manor. That is the only sense in which there ever was any common of pasture attached to this land at all, and that was by a distinct grant and permission of the lord of the manor when he let this land to his own tenants. It was in lease with the rest of the farm at the time of the deed of 1859 by which this close was granted to *Maudslay*, the predecessor in title of the present claimant.

We approach the deed then with these facts, and what strikes me as extraordinary is, that if it was the intention of the parties to that deed to attach to the fee simple which was conveyed by it not to the tenant, but to a stranger, a right of common, there was no reason why they should not say so in express, clear, explicit, and unmistakable words. There is nothing whatever in the deed to pass the right of common except the mention of

commons among the general words which are used in that deed as they were until recently used in all deeds of conveyance, and the word which is used in connection with commons is commons "belonging" to this land. I have said that in no sense was there any common belonging to this land, except that as between the lord and his tenants he had been accustomed to give his tenants permission to exercise rights of common such as he had himself in respect of this land when he let it. Now, when you find not a grant of the reversion to the tenant like that in *Doidge* v. *Carpenter* (1), but a grant to a third person who has no kind of connection with the tenant, a grant which contains no recital of any intention to give rights of common, no express and explicit grant of this particular right of common, and which is not even a grant of the whole, but only of about one-fifth part of the farm in respect of which rights of common had been conceded to the tenants—is it the necessary construction of the deed that the purchaser of these fifty-three acres is to have a right of common in respect of the fifty-three acres similar to that which the tenant of the whole farm had in respect of the farm? I am not able, I confess, to come to that conclusion. It seems to me that the case of *Doidge* v. *Carpenter* differs widely. It has been pointed out already, and I will not repeat at any length what has been said, that in *Doidge* v. *Carpenter* there was an express lease of a right of common to the lessee, and there the landlord, dealing with the lessee, who was at that moment under the lease enjoying by the express terms of the lease a right of common, releases, in fact, the reversion to him, conveys to him the fee simple together with all commons and common of pasture thereunto belonging or in anywise appertaining, that is, the landlord conveys to the tenant the fee simple of the land which he was enjoying with the common and the right of common thereto appertaining; and Lord *Ellenborough* says that under the circumstances the words "thereunto belonging or in anywise appertaining" seem as if they were studiously selected in order to constitute a grant *de novo* of the rights which had up to that time been enjoyed. When a landlord conveys the reversion in fee to his tenant with

(1) 6 M. & S. 47.

C. A. 1892 BARING v. ABINGDON. Kay, L.J.

all commons and rights of common appurtenant, the grant may, as between the landlord and tenant, very well be construed to include those rights of common which by grant of the landlord the tenant is enjoying at the moment of the conveyance to him. I think that the case is very widely different in that respect from the case which is before us now. This is not a grant to a tenant or any one who was in possession or enjoyment of any rights of common at the time, it is a grant to a man who at the moment was an entire stranger to this property. Then I cannot leave out of sight this circumstance also. If the tenant himself had been granting away part of the thing let to him, there might, according to the case of *Sacheverell* v. *Porter* (1), have been in law an implied apportionment of the right of common which he enjoyed in respect of the whole farm; but the doctrine of that case does not by any means necessarily apply to a grant like this. If the grant did very clearly express, or if its necessary or proper construction was, that a right of common was granted, then the doctrine of that case might apply to shew that it was a portion of that right of common which could be ascribed to this particular land which was then being conveyed; but of course you first of all have to arrive at the conclusion that there was by this deed a grant of a right of common.

I agree that in this case in order to come to the conclusion that any right of common passed, it is absolutely necessary to hold that the deed of itself created a right of common, because up to that time no right of common annexed to the fee simple of the land granted had ever existed at all.

I do not think it necessary to canvass *Thomas* v. *Owen* (2), *Ewart* v. *Cochrane* (3), and like cases, where there having been a grant of a particular subject of real estate, it was held that an easement which was, if not necessary for the enjoyment, at any rate a thing which had up to that time been enjoyed and was an important adjunct by way of easement to the thing granted, did pass. To my mind, those cases have nothing to do

(1) W. Jones 396. (2) 20 Q. B. D. 225.
(3) 4 Macq. 117.

with a right of common like that claimed in this case, and, therefore, for these reasons I concur in the judgment of the other members of the Court, and think that this appeal should be dismissed with costs.

Solicitors for Appellant: *Horne & Birkett.*

Solicitors for Defendants: *Lawrence, Graham, Gray, & Sutherland.*

H. C. J.

NORTH, J.
1892
April 29;
May 3.

WORLEY *v.* VESTRY OF ST. MARY ABBOTTS, KENSINGTON.

[1892 W. 992.]

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75 [*Revised Ed. Statutes, vol. xiv. p.* 430]—*Building Line—Open Spaces.*

An old house was pulled down in 1873, part of the site was thrown into the road; the rest was made part of a space intended to be used as garden to a new mansion. The mansion was pulled down in 1880. The whole property had become a building estate:—

Held, that the site of the old house was open ground, so as to be subject to the provisions of sect. 75 of the *Metropolis Management Amendment Act*, 1862.

Lord Auckland v. *Westminster District Board of Works* (1) distinguished.

KENSINGTON ROAD and *Kensington High Street* form a continuous line of thoroughfare running east and west, *Kensington Road* being to the east of *Kensington High Street.*

In and previously to 1872, on the south side of *Kensington Road*, adjoining *Kensington High Street*, stood a large old house called *Colby House*, which projected into what is now the public road. Adjoining *Colby House* and grounds, to the east were the grounds of another old house called *Kensington House*. *Kensington House* stood some distance back from the public road.

In the year 1872 Baron *Albert Grant* purchased *Colby House* and *Kensington House*. In 1873 he pulled down both houses and threw their grounds into one curtilage. He altered the boundary-line of the premises abutting on *Kensington Road*, so that the road was widened and part of the site of *Colby House* was made part of the road. He built a mansion standing back from the road on a part of the premises. The rest of the site was intended by him to be used as a garden, except that a one-storied lodge was built in the corner on the site of part of *Colby House*.

The mansion was never occupied; it was pulled down in 1880. Since that time a building had been erected on part of the site of *Colby House*, contiguous to and in a line as to its front with

(1) Law Rep. 7 Ch. 597.

the adjoining houses to the west fronting *Kensington High Street*. This building was occupied by the *London and County Bank* as a branch bank. A little distance to the east of the bank a road had been constructed called *Kensington Court*. This road ran southwards at right angles to *Kensington Road*, through the middle of the site of *Kensington House*. To the east of *Kensington Court* some houses had been built fronting *Kensington Road* to the north. The line of the front of these houses was further back than the line of the front of the bank and the adjoining houses in *High Street*.

The Plaintiff, *Robert James Worley*, had a building lease of the ground between *Kensington Court* and the *London and County Bank*; he commenced to build a row of houses on that site fronting *Kensington Road* in a line with the bank, and therefore further forward than the houses to the east of *Kensington Court*. On the 8th of March, 1892, the superintending architect of the *London County Council* made a certificate by which he decided that the main fronts of the buildings to the east of *Kensington Court* formed the general line of buildings on the south side of *Kensington Road* between *Victoria Road* (a road still more to the east) and *Kensington High Street*. The prolongation of the building-line over the Plaintiff's building site was shewn by reference to a dotted pink line on a plan annexed to the certificate, which line was in the rear of the front of the buildings the Plaintiff had begun.

The *Kensington Vestry* served a notice on the Plaintiff requiring him to put back his buildings to the line certified by the superintending architect of the *London County Council*.

On the 22nd of March, the Plaintiff issued the writ in this action, and on the same day by leave of the Court he gave notice of motion to the Defendant vestry for an injunction to restrain them from acting on the notice requiring the Plaintiff to set back his building-line. On the same day the Plaintiff gave notice of appeal pursuant to the provisions of sect. 28 of the *London County Council* (*General Powers*) *Act*, 1890, against the certificate of the superintending architect. The appeal came on for hearing on Saturday, the 9th of April, 1892, when the hearing of it was adjourned to permit this motion to be heard first.

NORTH, J.

1892

WORLEY v. VESTRY OF ST. MARY ABBOTTS, KENSINGTON.

Cozens-Hardy, Q.C., and *Meates*, for the Plaintiff:—

Our case is that the matter is not within sect. 75 of the *Metropolis Management Amendment Act*, 1862, the section under which the Defendants are purporting to act. We admit that, if the land were within that section, the only tribunal to determine the building-line would be the superintending architect of the *London County Council*, subject to an appeal to the Court constituted by the *London County Council* (*General Powers*) *Act*, 1890. But if we are right in saying sect. 75 does not apply, the Court has jurisdiction to restrain the Defendants from proceeding: *Stannard* v. *Vestry of St. Giles, Camberwell* (1).

A portion of the land on which the Plaintiff has begun to build, extending right up to the road, was formerly the site of part of *Colby House*. There never has been an intention on the part of the owner to give up the right to use that as a site for building, or to devote it to an open space for ever. The case therefore does not come within sect. 75 of the *Metropolis Management Amendment Act*, 1862: *Lord Auckland* v. *Westminster District Board of Works* (2). The Defendants, therefore, cannot require that any part of that land shall be left unbuilt on without paying compensation. It may be that they can require the line of building to be set back under sect. 74 on paying proper compensation. We have established that the notice to set back is bad as to part. It is therefore bad altogether.

Brice, Q.C., and *Theobald*, for the Defendant vestry:—

The certificate of the architect is final (subject only to the pending appeal to the tribunal constituted by the *London County Council* (*General Powers*) *Act*, 1890), provided the case comes within sect. 75; and it is immaterial that the building-line laid down does not extend over the premises of the bank which are in the same street. These building-lines may be for a row of houses, or place, part of a street, or part of two streets. Where one name begins, and another ends, is immaterial: *Spackman* v. *Plumstead District Board of Works* (3); *Barlow* v. *Kensington Vestry* (4). The decision of the latter case in the Court of

(1) 20 Ch. D. 190.
(2) Law Rep. 7 Ch. 597.
(3) 10 App. Cas. 229.
(4) 11 App. Cas. 257.

Appeal (1), shews that *Lord Auckland* v. *Westminster District Board of Works* (2), does not go so far as deciding that if land has once been built upon it can be kept open for any number of years, and still excluded from the operation of sect. 75. Nor does the language of the Judges in Lord *Auckland's Case* itself justify that contention. We submit that this land had been, in the words of Lord Justice *Mellish* (3), turned to the purpose of an open garden, and was vacant ground so as to be within the operation of sect. 75 of the Act. The finding of the Court of Appeal in *Barlow* v. *Kensington Vestry* (4) was reversed in the House of Lords, but not on grounds which militate with this view.

Cozens-Hardy, in reply.

NORTH, J. (after stating the facts, and reading sects. 74 and 75 of the *Metropolis Management Amendment Act*, 1862, continued):—

The first question is whether this case comes within sect. 75 at all or not. As to that, it depends on this. As I mentioned, *Colby House* came right up to the *Kensington Road*. The *London and County Bank* was built on a portion of the site of *Colby House*. The rest of the site of *Colby House* is taken up by the Plaintiff's proposed new building, which also extends eastward beyond *Colby House*, over part of what was *Kensington House*, and the ground unbuilt on which stood in front of *Kensington House*, and between it and the road.

The Plaintiff relies on the case of *Lord Auckland* v. *Westminster District Board of Works*. In that case a railway company had taken certain buildings coming up to the road, for the purposes of a railway. They had taken down the buildings on the land they had so acquired, and made their railway on a part of it; but the rest, which they did not require, they sold to Lord *Auckland* for building purposes, and he proceeded forthwith to erect buildings upon it. There proceedings were taken as here; but it was contended by Lord *Auckland*, and successfully, that the section did not apply to land situate as that was,

(1) 27 Ch. D. 362.
(2) Law Rep. 7 Ch. 597.
(3) Law Rep. 7 Ch. 605.
(4) 11 App. Cas. 257.

NORTH, J. 1892 WORLEY v. VESTRY OF ST. MARY ABBOTTS, KENSINGTON.

which really was building land covered with houses—houses taken down for a temporary purpose, and the land handed over to another person to build upon, and forthwith rebuilt on by him. There is no doubt it came within sect. 74, if that section, and not sect. 75, applied, and the Commissioners would be right in taking the land, giving compensation; but no compensation has to be given under sect. 75, and therefore the great question was whether it was to be under the 74th or 75th section. With respect to that, the observations of the learned Judges are important. Lord Justice *James* said this (1): "The land in question is the site of lately existing buildings, which site and buildings were taken for some purpose or other in connection with the construction of the *Metropolitan District Railway*. I am of opinion that Lord *Auckland*, as the purchaser of that site from the *Metropolitan District Railway Company*, who were the purchasers from the former owners, has exactly the same rights . . . as he would have had if he had bought the ground with the houses standing upon it, and had taken them down himself a few days ago for the purpose of building what he now intends to build in their place." Then he says that that comes within sect. 74. Then a little further on, he says: "It is contended that although the 74th section provides that a man's property may be taken in a certain way upon a compensation being given him, the 75th section goes on to enact that it is to be taken away without any compensation at all by the same body. I am of opinion, having regard to the old clauses in lieu of which this 75th section was enacted, and having regard to the 74th section, which immediately precedes it, and to the whole context of the Act and the whole spirit of recent legislation with regard to dealing with private person's property, that the 75th section was only meant to apply to the case of a new building, structure, or erection, being built on land which, for the purposes of the Act, would properly have been described by Mr. *Vulliamy*" (he was the architect) "as vacant ground. I am therefore of opinion that there was no jurisdiction in the *Metropolitan Board* or in the District Board to interfere with any building which Lord *Auckland* might erect on that land,

(1) Law Rep. 7 Ch. 604.

except in accordance with the provisions of the 74th section; that the 75th section does not apply at all to it; and that Mr. *Vulliamy's* line, whether rightly or wrongly laid down by him as the general line of the street, would not authorize them to interfere with Lord *Auckland's* property." Then Lord Justice *Mellish*, after commenting on the two sections says (1): "To make the two sections consistent with each other, I think that we must construe the words 'no building, structure, or erection' in the 75th section to mean no building, structure, or erection built or erected for the first time." Then, a little further on, he makes some remarks, which, in my opinion, are of great importance with regard to the present case: "I do not mean to say that in every case after a building has been erected the site of that building is to remain for ever within sect. 74 and never come within sect. 75. We might suppose a case of a building pulled down and the site of the building turned to a totally different purpose—made, for instance, into an open garden. Or we might suppose a man pulling down his building and voluntarily setting it back to the general line of the street. I do not suppose that in such a case any subsequent owner who might acquire the site, or the same owner, could, after that, take advantage of its being an old site. Just in the same way, if a man pulls down a house, and the ground is left vacant for so many years that all supposed intention of rebuilding is gone, then all the right to the lights will be gone also; but if there is an intention to rebuild, even though there is a delay of two or three years, still the right to the lights would remain. And I do not suppose that it would make any difference if, when the original owner had pulled down the house, he had sold the land with the right of building the house again. In the same way I think that, in the present case, if the houses are pulled down under circumstances which would lead every one to suppose that the houses would, as a matter of course, be rebuilt, the site being practically of no value, except as building ground, it would be wrong to say that the rights which it formerly possessed as to the line of buildings are lost by the mere circumstance that the railway company has found it necessary, for the purpose of

(1) Law Rep. 7 Ch. 606.

NORTH, J.
1892
WORLEY
v.
VESTRY OF
ST. MARY
ABBOTTS,
KENSINGTON.

constructing their railway, to take down these houses." Then there are some further remarks commenting on those observations by Lord Justice *Cotton*, in the case of *Barlow* v. *Kensington Vestry* (1). I may mention at once that that decision was reversed in the House of Lords, but on grounds that have nothing to do with the point on which Lord Justice *Cotton* made the observations I am going to refer to, and the decision in the House of Lords does not in any way affect the value of those observations. He says (2): "The first point one has to consider is, whether this house is within the provision of sect. 75." Then he refers to the section, and says: "The first point is this: to what does that apply? Does it apply to a house which is built on the site of an old house which has been pulled down and which has occupied a more prominent position? By which I mean a position stretching farther towards the roadway than the other houses. In my opinion the rule was correctly laid down by Lord Justice *Mellish* and also by Lord Justice *James* (though not exactly in the same words) in the case of *Lord Auckland* v. *Westminster District Board of Works* (3), a case which has been much referred to"; and then he quotes the passage which I read from Lord Justice *Mellish's* judgment: "'To make the two sections consistent with each other, I think that we must construe the words 'no building, structure, or erection,' in the 75th section to mean no building, structure, or erection built or erected for the first time.' The language is imperfect; 'for the first time' requires some explanation. Of course, every new house that is put up must be erected for the first time, but what he means obviously is this: a house which is not built as a restoration of an old house—a building which is not built as a restoration of an old building, but one which is to be considered as built *de novo* as regards the rights of a house. Although Lord Justice *James*, with reference to the certificate which was before him, which mentioned vacant land, uses the word 'vacant,' I think he really means the same thing, because he says"—and then he quotes the passage which I read from his judgment—and I will not read it again—"Mr. *Vulliamy*, who in the plan had laid down the building-line in that

(1) 27 Ch. D. 362. (2) 27 Ch. D. 378.
(3) Law Rep. 7 Ch. 597.

case beyond *York Place*, had described a site of the old house which the plaintiff had bought, which was in fact pulled down, but under circumstances which shewed an intention to rebuild it, as 'vacant land'; and, therefore, although Lord Justice *James* does use the term 'vacant land,' in my opinion what he means, just as Lord Justice *Mellish* does, is this, that sect. 75 only applies to a house which may be called as regards the rights of a house a new house; and if a man has a house which is pulled down, that house and everything which is called the house, if he shews an intention to rebuild it, is that which has the right of an ancient house as it stood; and in that respect sect. 75 is consistent with sect. 74."

Having regard to those observations, and applying them to the present case, is the building which the Plaintiff is about to erect a restoration of an old house, or a new house, within the meaning of those words as defined in the passages of the judgments which I have read. In my opinion, the building the Plaintiff is proposing to erect is a new building. The state of things existing here is precisely that described by Lord Justice *Mellish* in his judgment, by way of illustration—a case to which sect. 75 would not apply; for, in the first place, the old houses were pulled down; they were not restored at all, but their site was thrown into what Lord Justice *Mellish* calls an open garden, making this case exactly correspond with that which he deals with; and the house itself, which was a new palace, was built on a new site a good way back from the road.

I may mention here that when *Albert Grant* built his mansion there also was a small lodge put up somewhere near the north-west corner of the land, which stood there while the mansion stood, but was removed when the house was taken away—a small lodge of one story high; and in my opinion the existence of that building does not make any difference. The fact that that lodge stood on part of the Plaintiff's site for seven years does not, in my opinion, prevent the building which the Plaintiff is erecting being a new one within the meaning of the decisions I have referred to, notwithstanding the existence of that lodge for seven years on a small portion of it. Then for seven years this land was garden and not house at all, and for

NORTH, J. 1892 WORLEY v. VESTRY OF ST. MARY ABBOTTS, KENSINGTON.

something like twelve years from that time it has still been vacant ground. In my opinion the house that is being built on it, is a new building within the meaning of those decisions.

There is this further consideration. Supposing that during the time that *Albert Grant's* house was standing, that is from 1873 to 1880, a question had arisen as to where the line of building in the *Kensington Road* was. The line of building must be arrived at by an architect with reference to the buildings existing on the lands abutting on the road: and what would he have looked to on the Plaintiff's site? Why of course he must have looked to the house then standing on the land. He must have taken *Albert Grant's* house as shewing the line of building on the land at that time: and he could not have taken the old line of the building which had been removed, and which had been buried, as any test whatever as to what the line of building was on this piece of land between 1873 and 1880. There could not be two lines of building inconsistent with one another, both existing on the same piece of land at the same time; and therefore from 1873 to 1880 it is clear that the only line of building on this land which could have been looked at was not the site of the old houses, but the existing mansion, standing back in a garden which came down to the road.

For these reasons I come to the conclusion that sect. 74 does not apply to the present case; and although I should have had jurisdiction to interfere if it did apply, I have no jurisdiction to interfere if it does not.

Then, in my opinion, the architect's certificate, under sect. 75 of the Act, was made conclusive, as settled by the case of *Spackman* v. *Plumstead District Board of Works* (1).

But the matter does not rest there entirely, because when that case was decided there was no appeal of any sort from the decision of the architect to the Court, or anywhere else.

Now, under the Act of 1890, to which I have referred, an appeal is given to a particular tribunal; and the Act itself provides that the decision of the tribunal, whether it confirms or reverses or varies such certificate, shall finally determine the general line of building. In my opinion the matter remains just

(1) 10 App. Cas. 229.

as it did when the House of Lords decided *Spackman's Case* (1), subject to this appeal given to a tribunal created by that Act; and their decision is to finally determine the general line of building. In my opinion the certificate remains in force if it is not appealed from. If it is appealed from, the decision on appeal is final, and there is no room left in either case for any interference on the part of the Court. Of course, I am not dealing with such cases as where a certificate has been obtained by improper means. That is a totally different matter, with respect to which the Court might have jurisdiction: and I merely mention it as not having anything to do with this case. The result is that the certificate is one with which I cannot interfere; whether it be well-founded or not, must be settled by the tribunal of appeal.

This being treated as the trial of the action, there will be judgment for the Defendants: and the costs must follow the result.

Solicitors for Plaintiff: *Poole & Robinson.*
Solicitors for Defendants: *Pontifex, Hewitt, & Pitt.*

D. P.

REID *v.* BURROWS.

[1892 R. 717.]

Solicitor's Articles—Construction—Client—London Agent.

Country solicitors held to be "clients" of their London agent within the meaning of a covenant by an articled clerk not to transact business with persons who should be clients of his master's firm during the period of the articles.

THIS was an action by the members of a firm of London solicitors against *Charles Edward Burrows*, a solicitor practising in London, to restrain the Defendant from acting in breach of a covenant not to transact business with persons who were clients of the Plaintiffs' firm during a period of five years, when the Defendant was articled to *Henry Reid*, one of the Plaintiffs. The

(1) 10 App. Cas. 229.

NORTH, J.
1892
REID
v.
BURROWS.

action was brought on on a motion for an interlocutory injunction; the motion was treated as the trial of the action.

The articles were entered into in the year 1881. The covenant on which the action was founded was a covenant by the Defendant:—

"Not, without the consent in writing of the said *Henry Reid*, and any partner of his during the term of five years, at any time within ten years after the expiration of the said term of five years, transact business either on his own behalf or as clerk to any other person, for any person or persons, company or corporation, who shall at any time during the said term of five years be a client or clients of the said *Henry Reid*, or any partner of his."

There was evidence that the Defendant had acted as London agent in two matters for Messrs. *Ellison & Burrows*, a firm of Cambridge solicitors, whose London agents during the currency of the articles had been the Plaintiffs' firm. There was also evidence that the Plaintiffs' firm had acted as solicitors for *W. Ellison*, one of the firm of *Ellison & Burrows*.

Cozens-Hardy, Q.C., and *T. L. Wilkinson*, for the Plaintiffs:—

A country solicitor is a client of his town agent within the ordinary meaning of the word client: *Storer* v. *Johnson* (1); *Ostle* v. *Christian* (2); *Jones* v. *Roberts* (3); *Smith* v. *Dimes* (4). But even if a London agent is not necessarily a solicitor for his principal in the country, in this case it has been shewn that the country firm were strictly the clients of the Plaintiffs' firm.

Kenyon Parker, for the Defendant:—

A country solicitor is not the "client" of his London agent: *Litchfield* v. *Jones* (5); *Ward* v. *Eyre* (6). On the facts, I submit that *Ellison & Burrows* were not clients of the Plaintiffs' firm, even if they acted on occasion as solicitors for them. The business that the Defendant is restrained from transacting for clients of the Plaintiffs is restricted to solicitor's business; if it

(1) 15 App. Cas. 203.
(2) T. & R. 324.
(3) 8 Sim. 397.
(4) 4 Ex. 32.
(5) 36 Ch. D. 530.
(6) 15 Ch. D. 130.

means anything more the covenant is void as being in restraint of trade.

Cozens-Hardy, in reply.

NORTH, J.:—

I think the Plaintiffs are right, and that it is established that the relationship of solicitor and client existed between the Plaintiffs and Messrs. *Ellison & Burrows* by many cases, for instance, *Ostle* v. *Christian* (1), *Jones* v. *Roberts* (2), and *Smith* v. *Dimes* (3), a case decided in 1849, in which the question was fully considered by the Court of Exchequer. There *Pollock*, C.B., in giving the judgment of the Court, says (4): "In the absence of authority to the contrary, we are strongly inclined to think, that, under the 2 Geo. 2, c. 23, an agent's bill could be taxed, as I held in the case of *Billing* v. *Coppock* (5), above cited. Even admitting that the statute applies only to attorneys claiming costs against those who stand in the relation of clients to them, as the statute mentions only one party to be charged, it does not follow that a town attorney may not hold a country attorney liable, as being, with respect to him, his client; for there is no privity between the party plaintiff or defendant employing the country attorney, who is certainly the only party to be charged by him."

Again, in *Storer* v. *Johnson* (6), a case which came before me, and afterwards went to the House of Lords, the only question was whether a country solicitor was entitled to have a part of his *London* agent's bill taxed without having the rest taxed. It was held that a part of the bill, as distinct from the whole, could be taxed.

But Mr. *Parker* relies on two cases which, he says, are in his favour. The first case is that of *Litchfield* v. *Jones* (7). I do not think anything turns on that, because there I came to the conclusion that a *London* agent was liable to imprisonment rather under sub-sect. 3 of sect. 4 of the *Debtors Act*, 1869, than under

(1) T. & R. 324.
(2) 8 Sim. 397.
(3) 4 Ex. 32.
(4) 4 Ex. 39.
(5) 1 Ex. 14.
(6) 15 App. Cas. 203.
(7) 36 Ch. D. 530.

NORTH, J.
1892
REID
v.
BURROWS.

sub-sect. 4, and I did not treat him as a solicitor for that purpose. The other case, *Ward* v. *Eyre* (1), in the Court of Appeal, is more important. There the observations of the Lords Justices were to the effect that the provisions of sect. 17 of the *Attorneys and Solicitors Act*, 1870, as to allowing interest on taxation, did not apply in a suit for an account by a country solicitor against his *London* agents, it being a suit for an account between principal and agent. Sir *George Jessel*, in giving judgment in the Court below, said: "Then the only other point is the claim for interest under the *Attorneys and Solicitors Act*, 1870, which says (sect. 17), that subject to the general rules the taxing officer may allow interest at such rate and from such time as he thinks just on moneys disbursed by the attorney or solicitor for his client. That has nothing to do with an account as between principal and agent, and one cannot say that a country solicitor and his town agent occupy the position of solicitor and client. The Act does not apply to accounts between country solicitors and town agents."

I need not read the observations of the Lords Justices in the Court of Appeal. I think as to all of them they intended to decide that the provisions of sect. 17 of the Act of 1870, as to the allowance of interest or the taxation of an attorney's bill, did not apply in taxing accounts in a suit between a country solicitor and his *London* agent; that they did not intend to depart from the law as laid down in the cases cited. Under the circumstances, I have come to the conclusion that, within the meaning of this covenant, the relationship of solicitor and client did exist between the Plaintiffs' firm and Messrs. *Ellison & Burrows*, and the Defendant has broken his covenant.

Solicitors for Plaintiffs: *Maynard & Son.*
Solicitor for Defendant: *C. E. Burrows.*

(1) 15 Ch. D. 130, 134.

D. P.

NORTH, J.
1892
May 6.

In re HENRY LISTER & CO., LIMITED. *Ex parte* HUDDERSFIELD BANKING COMPANY.

[1892 H. N. 025]

Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 6, *sub-s.* 2; *Sched. I., r.* 8—*Secured Creditor—Amendment of Proof—Inadvertency.*

A creditor, the holder of a direct security, believing it to be collateral, proved for and voted in respect of his whole debt in the winding-up of a company. He was allowed to place a value on his security and to amend his proof by reducing it by such value and retain the benefit of the security notwithstanding that he had voted on the whole debt after hearing a statement that the security was not collateral but direct.

THIS was a motion on the part of the *Huddersfield Banking Company, Limited*, to be allowed to withdraw a proof of debt put in on their behalf at a meeting of creditors of *Henry Lister & Co.* held on the 29th of February, 1892, or in the alternative for leave to amend the proof by inserting a security and putting a value on the same on the ground that the omission to insert such security and to value the same arose from inadvertence.

In 1889, *Henry Lister* was carrying on business as a manufacturer at *Ashburn Mills*, near *Huddersfield*. He held a lease of the mills. In that year his banking account, which was largely overdrawn, was transferred from another bank to the *Huddersfield Banking Company*. He assigned his lease of the mills and certain policies of life assurance to the *Huddersfield* bank to secure what should be due from time to time on his current account.

In the year 1890, *Henry Lister & Co., Limited*, was incorporated by registration for the purpose of taking over the business, the business assets and liabilities of *Henry Lister*. The assets including the equity of redemption of the leasehold mills were transferred to that company. The *Huddersfield Banking Company* allowed the account of *Henry Lister*, which was then overdrawn to the extent of £21,728, to be transferred to the name of the new company on the terms of the securities held by the bank being kept on foot to secure the amount due from time

NORTH, J.

1892

In re HENRY LISTER & CO., LIMITED *Ex parte* HUDDERSFIELD BANKING COMPANY.

to time on the current account opened in the name of the new company.

A deed was executed by which the policies of assurance were charged as collateral security for the amount to be due from time to time on the new account.

A deed of arrangement was also executed between *Henry Lister & Co.* of the first part, *Henry Lister* of the second part, and the bank of the third part. This deed recited that the business effects of *Henry Lister* had been transferred to the new company, and it was witnessed that the lease, then vested in the bank by way of mortgage, should be charged with the amount due from time to time from *Henry Lister & Co., Limited*, and it was agreed as between *Henry Lister* and *Henry Lister & Co.*, that the leasehold premises should be the principal security.

On the 16th of January, 1892, *Henry Lister & Co.* was ordered to be wound up compulsorily. The amount due from them to the *Huddersfield Banking Company* at that time amounted to upwards of £36,500. The first meeting of creditors was held on Friday, the 26th of February, 1892. The manager of the *Huddersfield Banking Company* attended the meeting on their behalf. The directors and officers of the bank believed that the mortgage of the leasehold mills was a security on property of a person other than the principal debtor. The manager in accordance with his instructions, proved for the whole amount of the debt, and did not place any value on the security. He also nominated a person as official liquidator, and voted on behalf of the bank in respect of the full amount of the debt. The creditors resolved on the appointment of the person nominated as liquidator, but he was not ultimately appointed, and the official receiver remained liquidator. There was evidence that it was stated to the manager at the meeting that the mortgage of the leasehold mills was not a collateral security.

Cooper Willis, Q.C., and *C. M. Atkinson*, for the Applicants:—

On general principle, the Court in administering an estate in bankruptcy, where a person by mistake has so acted that he has given up an advantage which he would not have given up had he known and understood what he was doing, will allow the

matter to be rectified, whether it be or be not a case in which a private person could have, insisting on the strict law, taken advantage of the mistake: *Ex parte Schofield* (1); *Ex parte Bagshaw* (2); *In re King* (3); *Ex parte James* (4); *Ex parte Simmonds* (5). In this case, as we submit, there was an inadvertency within the meaning of rule 8 of the first schedule to the *Companies* (*Winding-up*) *Act*, 1890, and a case has not yet arisen for forfeiture. The Applicants are entitled to have their proof amended by allowing for the value of their security and to have the benefit of that security they never intended to give up.

Cozens-Hardy, Q.C., and *Alexander Young*, for the Official Receiver:—

The bank may have been mistaken. There has been no "inadvertence." The bank acted deliberately, and at the meeting it was pointed out to the manager the risk he ran in proving and voting for the whole amount. The bank got the benefit of the vote at the meeting. The right to retain the security is absolutely gone, and cannot now be revived: *Ex parte Ashworth* (6); *In re Palethorpe* (7).

Cooper Willis, in reply.

NORTH, J.:—

I have no doubt that in the present case when the proof was carried in a mistake was made, and that if it had been present to the minds of the parties what the real facts were, the proof would have been in a different form to what it was. I see no reason to believe that the company would have deliberately given up a right they had for the purpose of standing in a worse position against the estate than they would have stood in if they had done what they were entitled to do—to prove in the proper way, deducting the value of the security, and proving for the balance.

(1) 12 Ch. D. 337.
(2) 13 Ch. D. 304.
(3) 2 Morrell, 119.
(4) Law Rep. 9 Ch. 609.
(5) 16 Q. B. D. 308.
(6) Law Rep. 18 Eq. 705.
(7) Law Rep. 20 Eq. 273.

NORTH, J.
1892
In re HENRY LISTER & CO., LIMITED.
Ex parte HUDDERSFIELD BANKING COMPANY.

Then the notice of motion asks leave to amend the proof by inserting therein a certain security, and putting a value on the same, that is to say, leave to do precisely what I am satisfied they would have done if they had understood the real position of matters at the time the proof was sent in. Now, why should not that be done? The only reason I see why it should not be done is that the security has gone, that is to say, if the security had ceased to exist it would be wrong to give them the delusive relief of saying they might amend the proof by inserting the security, which meant nothing. The question is whether it has gone. Now that seems to depend upon a rule, which is not by any means happily expressed, in the schedule of the Act of 1890, namely, rule 8. I am sorry to say the drafting of rules and Acts does not improve as time goes on. Rule 8 is this: "For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it,"—that the present creditor ought to have done when he was intending to exercise his right of voting—"and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security." Therefore, he having done that, ought to have voted only in respect of a much smaller sum than that for which he did vote. As far as I have read at present he has done what he ought not to have done, but no penalty has been imposed upon him for doing it. Then we come to the words shewing what the penalty is—"If he votes in respect of his whole debt he shall be deemed to have surrendered his security." That is what he did, and here is the penalty, he is to "be deemed to have surrendered his security." If it stopped there, and the security is gone, it would be absurd for me to make the amendment which I have just suggested. But that is not the end of the rule, for it says: "he shall be deemed to have surrendered his security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence." I have already said that I am satisfied the mistake was made in the first instance. Being satisfied that the omission has arisen from inadvertence, it follows that the creditor's voting in respect of his whole debt is not to be deemed a

surrender of his security; and if that is literally to be followed, inasmuch as the Court does not deem him to have surrendered his security, his security remains at the full amount, and his proof would stand at the full amount also. That seems to me to be the logical meaning of the words used. But it is too absurd to suppose it is really what is meant. What is meant is this, that if there is a case in which the Court is satisfied that the omission to value has arisen from inadvertence he is no longer to be deemed to have surrendered the security. That being so, there is a security which is worth something. What value is to be put upon it, and how is it to be dealt with? I am told there is no rule addressed to the point, but the Court has in years gone by constantly under all sorts of circumstances allowed proofs to be varied, amended, or corrected—sometimes increased, sometimes reduced. I am satisfied that the Court has power to deal with the proof by way of allowing amendment or reduction, except so far as it is fettered by anything found in the Acts or rules. I think there is a rule to authorize any proper amendment of proof, and I think the proper way of putting the matter straight is to give leave to amend the proof by inserting therein the security and putting a value upon it.

Now, it was said there were two reasons why this should not be done. First, that the creditor had voted in respect of it. No doubt he might have voted in such a way that he got value for his vote, and he might by his vote have succeeded in so altering the position of the company, or some or all of the creditors of the company, that it would be unfair to say that he should be released from giving up what he has given up in consideration of securing the advantage which he has got by his vote. But in the present case I do not see that, by allowing him to amend what he has given as his proof, I am leaving him anything he gained by the vote which he gave. I do not find the vote really came to anything. The vote which he gave did not alter the position of things so as to entitle the creditors to hold him to the vote for that reason.

The second thing suggested was this: it was said that he was thoroughly warned, and that it could not be inadvertence, as he was then told how the matter stood. There are two things to be

NORTH, J.

1892

In re HENRY LISTER & Co., LIMITED.

Ex parte HUDDERSFIELD BANKING COMPANY.

said about that. In the first place, the manager was told at the meeting the question was whether the securities, which were believed to be collateral securities, did affect the property of the company. I do not know where the securities were when this information was given, and the notice was given at the meeting to a person who was not bound to accept at once the statement that was made to him that he was mistaken in taking the view that the property was a collateral security only. In the next place, even if the securities were there, and could have been examined, I do not see how the mistake made could then be corrected. The result is, that a creditor is to be relieved from the consequence of omitting to value his security if the Court on application is satisfied that the omission has arisen by inadvertence. If that omission to value did so arise, it did not follow that the manager shut his eyes at the meeting when he was told some mistake had been made—the harm had been done, and could not be corrected at that time. Under these circumstances, I am not satisfied that I should not do what I think is fair, namely, allow the mistake to be corrected by amendment.

I see that in the case of *In re King* (1), the trustee had to pay the costs. I cannot follow that. I think in this case the creditor must pay all the costs caused by the application made on his behalf to correct his own mistake. The order will be made on those terms.

Solicitors for Applicants: *Iliffe, Henley, & Sweet*, agents for *Laycock, Dyson, & Laycock, Huddersfield.*

Solicitors for Official Receiver: *Ramsden, Radcliffe, & Co.*, agents for *Ramsden, Sykes, & Ramsden, Huddersfield.*

(1) 2 Morrell, 119.

D. P.

In re EDDYSTONE MARINE INSURANCE COMPANY. *Ex parte* WESTERN INSURANCE COMPANY.

STIRLING, J.

1892

Feb. 4, 27.

Marine Insurance Companies—Reinsurance—Contract to "pay as may be paid" on Original Policy—Non-payment of Original Assured by Reinsured—Liability of Reinsurers—Winding-up.

Company *A.* having insured a ship, reinsured part of their risk with company *B.*, and duly paid them the premium. The reinsurance policy issued by company *B.* contained the following clause: "Being a reinsurance applying to the lines of the *A. Insurance Company*, policy No. , subject to the same terms and conditions as the original policy, and to pay as may be paid thereon." The ship sustained damage by perils insured against, and the *A. Company* became liable upon their policy, but had, as yet, paid nothing thereon. Both companies having gone into liquidation, the liquidator of the *A. Company* claimed in the winding-up of the *B. Company* the amount secured by the policy of reinsurance:—

Held, that payment by the *A. Company* on their original policy was not a condition precedent to their recovering against the *B. Company* on the policy of reinsurance.

Adjourned summons.

The above-named companies were both being wound up, and in the liquidation of the *Eddystone Marine Insurance Company, Limited*, the official liquidator of the *Western Insurance Company, Limited*, made several claims in respect of marine reinsurance policies issued by the *Eddystone Company*, which the official liquidator of the *Eddystone Company* refused to admit under the following circumstances.

Both companies were formed for the purpose of carrying on the business of marine insurance and reinsurance, and the policies in question were issued in the ordinary course of business, whilst the two companies were going concerns, in order to reinsure the whole or part of the contingent liabilities of the *Western Company* under the policies they issued to their assured. The terms of the policies in respect of which the reinsurances in question were effected varied in certain details, and the policies of reinsurance were not copies of the original policies of insurance containing those details; but the following clause or a clause to the like effect was inserted in all the reinsurance policies: "Being a

STIRLING, J. 1892 *In re* EDDYSTONE MARINE INSURANCE COMPANY. *Ex parte* WESTERN INSURANCE COMPANY.

reinsurance applying to the lines of the *Western Insurance Company, Limited*, policy No. , subject to the same terms and conditions as the original policy or policies, and to pay as may be paid thereon."

In the case of the claim selected as a test case, it appeared from the statement of facts submitted to the Court that a policy of insurance for £500 for a period of twelve months from the 26th of January, 1888, to the 25th of January, 1889, had been issued by the *Western Company* in respect of a steamship called the *Bonnington*, and a policy of reinsurance on the same ship for £250 for the same period, and containing the clause above stated, had been issued to the *Western Company* by the *Eddystone Company*. According to the statement of facts, it was to be assumed for the purpose of the decision of the question, but not further—(1.) That all the premiums on the reinsurance policies were duly paid to the *Eddystone* by the *Western Company*; (2.) that the vessel insured had sustained damage by perils insured against, and that the *Western Company* had become liable to pay the assured a sum in respect of such damage; and (3.) that, had the *Western Company* actually paid the claim, the *Eddystone Company* would have been liable to pay under its reinsurance policy the proper rateable proportion of the amount to the *Western Insurance Company*.

After these policies of insurance and reinsurance had been effected both companies went into liquidation, and the *Western Company* had not at present paid to their assured the sum mentioned in the policy or any part of it. The liquidator of the *Eddystone Company* contended that, having regard to the wording of the clause above mentioned, the *Eddystone Company* were liable to pay to the *Western Company* the proper rateable proportion of any dividend which might be paid by the *Western Company* to the original assured, only when, and not until, such dividend had been actually declared and paid. The liquidator of the *Western Company*, on the other hand, contended that, inasmuch as his company became liable to pay the sum assured by their policy in respect of the said damage to the original assured immediately upon the occurrence of the loss, the *Eddystone Company*, in like manner, also became liable immediately

upon the like event to pay the proper rateable proportion of such sum to the *Western Company*, irrespective of any question whether the *Western Company* had actually paid, wholly or in part, the claim under their policy or not—in other words, that the liability of the reinsurer accrued immediately upon the accruing of the liability of his reassured.

Joseph Walton, for the *Western Company*:—

The circumstance that we have not as yet paid anything in respect of our loss under the original policy is immaterial. Actual payment by the original insurers to the original assured is not a condition precedent to payment by the reinsurers to the reinsured. The contract of reinsurance is in its essence a separate and distinct contract from that of insurance. The original assured has no kind of claim against the reinsurer; the reassured remains solely liable on the original insurance, and alone has any claim against the reinsurer: *Arnould* on Marine Insurance (1). There is no doubt as to the general law. Where the original insurer has become bankrupt, and the assured has been paid a small dividend out of the estate, the reinsurer is still liable to pay the whole amount of the reinsurance without deducting the dividend, and the original assured has no claim in respect of the money so paid: *Arnould* on Marine Insurance (2); *Phillips*' Law of Insurance (3). That is the general effect of the contract, and the general understanding which the parties must have had in their minds, and the reinsurance policy now in question contains nothing to take the case out of the general law. It is in the usual form, and the clause containing the words "to pay as may be paid thereon," which is stamped upon it, was never intended to have, and cannot have, the effect attributed to it by the other side. Its object is obvious. The original policies may have been effected at various places, may not perhaps be at hand, or cannot be copied in, so the incorporation of the terms of the original policy is effected by putting in this form, which is the common form in use at *Lloyd's* for the purpose. In the cases of

(1) 5th Ed. p. 102; 1 Emerigon, Ch. viii. s. 14, p. 252.
(2) 5th Ed. p. 103; 1 Emerigon, Ch. viii. s. 14, p. 253.
(3) 5th Ed. s. 1752.

STIRLING, J. 1892 In re EDDYSTONE MARINE INSURANCE COMPANY. Ex parte WESTERN INSURANCE COMPANY.

Imperial Marine Insurance Company v. *Fire Insurance Corporation* (1); and *Uzielli* v. *Boston Marine Insurance Company* (2), the same clause with the same words was used to incorporate the terms of the original policy; and it must be observed that the words are not "if or when" paid thereon, but "as" paid thereon, which word "as" is the key to the meaning of the clause. The adjustment of the loss upon a policy is often a complicated matter, and it ends with a statement of the percentage to be paid by the insurer. The percentage may vary from a small percentage to cent. per cent., or the reinsurers might set up that the loss was not within the perils; so the words in question are introduced to shew the basis on which payment is to be made by the reinsurer, and their meaning is that the reinsurer is to accept any adjustment of the loss that may have been made. Thus, the wording of the clause is satisfied without the necessity of holding that payment is a condition precedent. To say that the liability of the reinsurer, who has received the premium on the full amount reinsured, depends upon the degree of solvency or insolvency of the original insurer, involves an absurdity. The *Eddystone Company* are accordingly bound to indemnify the *Western* against all claims up to the full amount of the reinsurance, whether the *Western* have paid anything or not.

[He also referred to *Martin* v. *Munich Assurance Company* (3).]

Hastings, Q.C., and *A. W. Rowden*, for the liquidator of the *Eddystone Company*:—

The principles of construction applicable to contracts of indemnity arising out of the relations between the parties have nothing to do with a case like this, for the whole question here is what meaning is to be given to the words "to pay as may be paid thereon." Our contention is that the construction is plain, and that the contract is one of indemnity only—"to pay"—that is, the *Eddystone* are to pay "as may be paid thereon"—that is, "as may be paid thereon by the *Western*." It means, in other words, "as you pay so will I." There is nothing whatever

(1) 4 C. P. D. 166.
(2) 15 Q. B. D. 11.
(3) Mathew, J., June 1, 1891; not reported.

to the effect that we are to pay when the amount of our liability has been adjusted; and we cannot under this clause be compelled to indemnify the *Western Company* except in respect of what they may actually pay, and not until they have paid.

Walton, in reply:—

It cannot be contended that, if the insurer is insolvent and can pay nothing, the reinsurer is to keep his premium and escape all liability.

[He referred to *Macarthur* on the Contract of Marine Insurance (1) and *Harris* v. *Scaramanga* (2).]

1892. Feb. 27. STIRLING, J. (after stating the facts of the case, continued):—

The words "to pay as may be paid thereon" do not stand in strict grammatical connection with those which immediately precede; but the effect of them is to impose an obligation as to payment on the reinsurers. The contention on behalf of the official liquidator comes to this—that those words make payment by the reinsured a condition precedent to payment by the reinsurer. Now, a main object of reinsurance is to relieve the reinsured from a portion of the risk previously undertaken by him; and the result of giving effect to the liquidator's contention would be that, before the reinsured obtains the benefit of his reinsurance, he must himself have paid on the original insurance, even though bankruptcy might be the result.

I think that this could not be intended, and that such a construction ought not to be put on the language of the policy unless it is clearly called for. In my opinion the words do not clearly require to be so construed. They would be satisfied if they were held to amount simply to this—that the payment to be made on the reinsurance policy is to be regulated by that to be made on the original policy of insurance. I am fortified in this view by the observations of Mr. Justice *Mathew* in the unreported case of *Martin* v. *Munich Assurance Company* (3),

(1) Page 279. (2) Law Rep. 7 C. P. 481.
(3) Mathew, J., June 1, 1891.

STIRLING, J. 1892 *In re* EDDYSTONE MARINE INSURANCE COMPANY. *Ex parte* WESTERN INSURANCE COMPANY.

with the shorthand notes of which I have been furnished. The contention of the liquidator of the *Western Company* must accordingly prevail; and I hold that payment by his company is not to be taken to be a condition precedent to his recovering against the *Eddystone Company*. As this is a test case, the costs will come out of the estate.

Solicitors: *Waltons, Johnson, Bubb, & Whatton; G. H. Carthew.*

W. W. K.

STIRLING, J. 1892 *April* 28.

FLEGG *v.* PRENTIS.

[1892 F. 139.]

Judgment Debt—Debtor's Reversionary Interest in Personalty—Creditor appointed Receiver—Equitable Execution—Declaration of Charge—Sale—Jurisdiction.

The Court has no jurisdiction to make a declaration of charge upon a judgment debtor's reversionary personalty in favour of a judgment creditor who has got himself appointed receiver of such property.

ON the death of a testator who died in September, 1889, the Defendant became entitled to certain reversionary and contingent interests under a will by which certain real and personal estate was vested in trustees in trust to convert and apply the proceeds for the Defendant amongst other persons.

On the 5th of September, 1890, the Plaintiff recovered judgment against the Defendant for £85 8*s.* 4*d.* in an action in the Queen's Bench Division, and he was subsequently appointed receiver of the Defendant's interests under the will.

The Plaintiff having been unable, by reason of such interests not having fallen into possession, to obtain payment of his judgment debt, brought the present action claiming a declaration that under and by virtue of his judgment and of the receivership order he had a charge upon the Defendant's shares and interests under the will for the sum of £85 8*s.* 4*d.* and interest and costs; that such charge might be enforced by sale of such shares and interests; and that the proceeds of such sale might be applied in payment thereof.

Greig, for the Plaintiff:—

The property of the judgment debtor in this case must be regarded as personalty: *Thomas* v. *Cross* (1); and accordingly the Plaintiff can derive no assistance either from 1 & 2 Vict. c. 110, or 27 & 28 Vict. c. 112. He has, however, by getting himself appointed receiver, placed himself in the position of having got as far as possible the property delivered in execution. He has the right to receive both the income and the *corpus* of the property when it falls into possession, and I submit that under these circumstances he is entitled to the assistance of the Court and to have a charge upon the property, and to have such charge enforced by sale. The Defendant can realize the property by selling it in the market; why should not a creditor of his in the position of the Plaintiff be entitled also to realize it?

In *Fuggle* v. *Bland* (2), a receiver was appointed of a reversionary interest in personalty, and although in *Westhead* v. *Riley* (3) Mr. Justice *Chitty* declined to make a charge, it was not on the ground of want of jurisdiction, but probably because he thought it was not necessary, as there was an action pending in the Palatine Court in which such charge might have been made. Even though there may be no direct authority, the Court will not be deterred by the absence of precedent from assisting a judgment creditor in the Plaintiff's position to recover his debt. [He also referred to *Levasseur* v. *Mason & Barry* (4).]

John Henderson, for the Defendant:—

There is no authority for such an order as asked for here, and it would be extending the jurisdiction of the Court to make it. In *Westhead* v. *Riley* Mr. Justice *Chitty* refused to declare a charge; and in *Fuggle* v. *Bland* the present question was never raised. The notion that a receivership order is a form of execution is erroneous. Relief by the appointment of a receiver was given on the ground that execution could not be had; and,

(1) 2 Dr. & Sm. 423.
(2) 11 Q. B. D. 711.
(3) 25 Ch. D. 413.
(4) [1891] 2 Q. B. 73.

STIRLING, J. 1892 FLEGG v. PRENTIS.

therefore, that form of relief cannot be the same thing as execution: *In re Shephard* (1).

Greig, in reply.

STIRLING, J.:—

This is an action without precedent. The Plaintiff is a judgment creditor who has issued execution against the Defendant, has been unable to recover, and has obtained an order appointing himself receiver of the Defendant's interests under a will. These interests are reversionary and contingent interests in real and personal estate given upon trust for sale and conversion. Therefore, in the eye of the Court, the fund of which the Plaintiff has been appointed receiver is personal estate. It is admitted that sect. 13 of the Act 1 & 2 Vict. c. 110, does not apply, as it is confined to lands; and the Plaintiff accordingly has no remedy by petition under 27 & 28 Vict. c. 112, and cannot get a sale. Under these circumstances he seeks to realize the property by obtaining a declaration that he has a charge upon it, and that it ought to be sold, and the proceeds applied in payment of his debt. I cannot see my way to assist the Plaintiff, although I would willingly do so if I could. He has got a receivership order under which, when the property falls into possession, he will be entitled to receive both income and capital. Previously to the *Judicature Act*, in order to obtain the appointment of a receiver, it was necessary for the judgment creditor to institute a fresh action; now the appointment of a receiver can be obtained in the same action as that in which judgment is recovered; but no case has been produced in which the Court has gone on to declare a charge; indeed, in *Westhead* v. *Riley* (2), Mr. Justice *Chitty* declined to make any declaration of a charge, though asked to do so; and in *Neate* v. *Duke of Marlborough* (3), Lord *Cottenham* expressly lays it down (4) that the jurisdiction exercised by the Court of Chancery was "not for the purpose of giving effect to a lien which is supposed to be created by the judgment." By sect. 13 of 1 & 2 Vict. c. 110, a

(1) 43 Ch. D. 131, 138.
(2) 25 Ch. D. 413.
(3) 3 My. & Cr. 407.
(4) Ibid. 416.

charge upon the real estate of a judgment debtor was for the first time created, and it was to take effect in favour of a judgment creditor who had entered up his judgment. But there is no corresponding enactment applicable to such interests as those of the Defendant in personal estate. I am therefore of opinion that I should be exceeding the jurisdiction I possess if I were to declare and enforce a charge in this case. Whether the property could be reached by a writ of sequestration I am not called upon to say; but if the law be defective, I cannot extend it. The action must be dismissed; but the Defendant's costs will be set off against the debt due by him to the Plaintiff.

Solicitor for Plaintiff: *W. M. Flegg.*
Solicitor for Defendant: *A. A. Timbrell.*

W. W. K.

KEKEWICH, J.

1892

Feb. 16; *March* 5.

LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* EVANS.

[1887 L. 76.]

Canal—Right of Navigation—Subjacent Mines—Easement—Right of Support.

By a private Act of *George* II., the undertakers were authorized to convert an existing brook into a "navigable" stream, and to maintain such "navigation," and to make such new cuts and canals as might be requisite for that purpose, paying compensation by an annual rent or a payment in gross to any landowner for user of or damage to his land in carrying on or maintaining "the said navigation"; also to charge tolls for the user by the public of "the said brook, cuts, or canals." There was no express power given to the undertakers to purchase lands, but persons under disability were authorized to sell lands required for "the said intended navigation." The Act contained no reference to mines or minerals, nor any express provision for their purchase.

The brook was duly converted into a canal, but no conveyances of surface lands were ever executed to the undertakers, who, under the Act, made annual payments to landowners for the user of their lands for the canal.

Ultimately, by a private Act of 1864, the canal became vested in the Plaintiffs, the Act providing that the canal should be subject to the provisions of any existing or future general Act relating to canals.

The Defendants, who were the owners of coal under the canal, having, in working their coal, caused a subsidence of part of the canal, the Plaintiffs brought an action for an injunction, on the ground that they had a right of support for their canal:—

Held, that the Act of *George* II. was to be read as equivalent to a grant by the owners of land over which the canal passed of a mere right to make and maintain the canal as a waterway, and not to a grant of the surface land; and that a grant of such a right did not carry with it, as a necessary incident, a right of support so as to prevent the landowners from working their subjacent mines.

Benfieldside Local Board v. *Consett Iron Company* (1) considered.

BY a private Act of 1754 (28 Geo. 2, c. viii.), certain persons, therein referred to as "the undertakers," were empowered (s. 1) to make a certain river or brook, called "*Sankey Brook*," falling into the river *Mersey*, and also certain branches thereof, "navigable, portable, and passable," for boats, flats, and other vessels, from the river *Mersey* below *Sankey Bridges* up the said river or

(1) 3 Ex. D. 54.

brook and its branches, "and from time to time to continue, maintain, and use such navigation"; and for that purpose to clear, open, scour, enlarge, or straiten the said river or brook, and the said several branches thereof, and (amongst other things) "to make such new cuts, canals, trenches or passages for water, in, upon, or through the lands or grounds adjoining or near unto the same river," or the said branches, as they should think proper and requisite; to remove all obstructions which might impede the navigation; to dig, take, and carry away soil, clay, gravel, or stone requisite for carrying on and constructing the said works and undertaking, in and from the grounds of any person or persons adjoining the said river or brook; and to do all other matters and things as the undertakers should think necessary for the making and maintaining the same river or brook, branches, cuts, canals, and passages navigable and passable as aforesaid, "the said undertakers, their heirs and assigns, doing as little damage as may be in the premises, and first giving satisfaction to the owners or proprietors of such lands, tenements, tythes, or hereditaments, respectively, as shall be digged, cut, removed, or otherwise made use of, or that in anywise shall be diminished, prejudiced, or damaged by or for the carrying on, effecting, or preserving the said navigation, or for maintaining and managing the same," as the commissioners thereinafter named should adjudge, in case the undertakers should not otherwise agree with the proprietors of such lands, &c. By sect. 3 commissioners were appointed for determining questions between the undertakers and owners and occupiers of lands affected by the said navigation; and they were authorized to determine what satisfaction, either by an annual rent or payment, or by a sum of money in gross, any person should have for such part of his lands, &c., as "shall be cut, dug, or removed, or made use of as aforesaid, and for the damage that shall be thereby sustained." By sect. 12 the undertakers were empowered to charge tolls for the carriage of coal and other merchandise over "the said river or brook, and the said branches thereof, cuts, or canals." By sect. 15, persons under disability were authorized to sell and convey "any lands, tenements, or hereditaments, which may be proper or convenient for, and facilitate the carrying on and effecting the said intended

KEKEWICH, J.
1892
LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

navigation," at a rent-charge charged on the premises sold and on the tolls levied under the Act. By sect. 25, the undertakers were required to secure the adjacent lands from being flooded, and to make fences, bridges, and other works for the accommodation of adjoining landowners. By sect. 26, it was provided that if any persons should sustain any damage in their lands or other hereditaments by unduly raising or lowering the water used in the navigation, or by not sufficiently making up the banks, or by diversion of streams, or by any other means not thereinbefore otherwise provided for, the amount of compensation should be assessed by the commissioners or by a jury.

By sect. 35, it was enacted that the said river or brook, and the several branches thereof, cuts, and canals, should for ever thereafter be taken to be an open, common, and navigable river from the river *Mersey*, below *Sankey Bridges*, up *Sankey Brook* and its said several branches, and such cuts and canals; and that the public should have free passage along and right of navigating the same upon payment of the tolls authorized by the Act.

By sect. 36, it was enacted that if the undertaking was not completed by the 29th of September, 1766, the commissioners might appoint other persons to complete it, and thereupon the powers of the present undertakers should cease.

The undertaking authorized by that Act was duly completed by the construction of a navigable canal; and by another private Act, of 1845 (8 & 9 Vict. c. cxvii.), "for uniting the *Sankey Brook* navigation with the *Saint Helen's and Runcorn Gap Railway*," the canal became vested in the *St. Helen's and Runcorn Gap Railway Company*, it being enacted that the "railway" referred to in the Act should be subject to the provisions of "any general Act relating to railways" which might pass during the then present or any future session of Parliament. Eventually, by another private Act, passed in 1864 (27 & 28 Vict. c. ccxcvi.), the canal —which was then known as the "*St. Helen's Canal*"—and also the *St. Helen's Railway*, became vested in the present Plaintiffs, the *London and North Western Railway Company*. By that Act the *London and North Western Railway Company* were required at all times to maintain the canal in good repair and condition, and fit for the purpose of navigation; and it was further provided

that the "undertaking"—which included both the *St. Helen's Railway* and the canal—should be subject to the provisions of "any general Act relating to railways or canals" then in force, or which might pass during the then present or any future session of Parliament.

None of the Acts contained any reference to mines or minerals lying under or adjacent to the canal, or any express provision as to the purchase of such mines or minerals.

The Defendants were lessees as to part and owners as to other parts of the coal under part of the lands over which the canal was constructed, and also under adjacent land which, at the passing of the Act 28 Geo. 2, c. viii., was vested in persons who were then the owners of land over which the canal was constructed. On the 1st of February, 1877, the Defendants gave the Plaintiffs notice in writing under the *Railways Clauses Consolidation Act*, 1845, that they intended to work the coal under the canal, but that they were willing to leave it unworked on receiving compensation. On the 5th of March, 1877, the Plaintiffs replied by letter that they claimed to have their canal supported; but they did not offer to make compensation for the mines thereunder, and no compensation was in fact ever made by the Plaintiffs, or by their predecessors in title, in respect of such coal.

Ultimately the Defendants proceeded to work the coal under the canal, and in doing so caused, as was in fact admitted, subsidences of portions of the banks and bed of the canal. The Plaintiffs then brought this action claiming an injunction to restrain the Defendants from working or getting any coal so as to cause damage or injury to the canal, and from otherwise causing any damage or injury to the Plaintiffs as owners of the canal; also damages for past injuries to the canal.

In their statement of claim the Plaintiffs alleged that the Defendants claimed to be lessees or owners of the coal under part of the lands over which the canal was constructed, and also under adjacent land which at the date of the passing of the Act 28 Geo. 2, c. viii., was vested in persons who were then owners of land in or over which the canal was constructed, and that the Defendants had removed, and threatened and intended to remove,

KEKEWICH, J.
1892
LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

coal from under those lands, including coal directly underneath the canal, and which coal had been and was necessary for the support and maintenance of portions of the canal; that the Defendants had by their mining operations already caused portions of the banks and bed of the canal to give way, to the great damage of the Plaintiffs; and that, unless the Defendants were restrained by injunction, the Plaintiffs would sustain serious further damage and injury.

The statement of defence contained the following allegation: "Under the several Acts of Parliament relating to the said canal the undertakers and corporations in whom the same has from time to time been vested have never bought or paid for or acquired any land upon which such canal has been made, or any mines or minerals thereunder, but have merely acquired a right in the nature of an easement to make and use a canal, coupled with the duty of maintaining the same in good repair, notwithstanding the exercise of any right of ownership by the owners of adjoining lands, or the mines and minerals thereunder, in respect of such lands or mines or minerals; and coal has for many years past been gotten by the owner and lessees thereof from under the said canal, and the said canal has been thereby let down without complaint by the Plaintiffs or their predecessors. In all such cases the Plaintiffs or their predecessors have the statutory duty imposed upon them of putting and keeping the said canal in repair, and are not entitled to any remedy or relief against persons getting their own coal. The Defendants are merely getting their own coal after due notice to the Plaintiffs, and the Plaintiffs have not bought or made compensation for, and are not even now willing to pay or make compensation for, the said coal. The Defendants are and always have been ready and willing and hereby offer to leave sufficient coal under or adjacent to the said canal to support the same upon receiving due compensation for the same."

Issue having been joined, the action now came on for trial.

The substantial question was whether the original right given by the Act 28 Geo. 2, c. viii., to make and maintain the canal, carried with it the right to support by the subjacent minerals. It appeared that no conveyances of any portions of the surface

lands over which the canal was constructed were ever executed to the undertakers, but that annual rents or payments were made under the principal Act to landowners for the right to make and maintain the canal over their lands, no lump sums being paid in any case.

It also appeared that small subsidences of the canal had previously occurred through the working of the subjacent coal at various intervals while the *St. Helen's Company* were the proprietors of the canal, and since it had become vested in the Plaintiffs, the *London and North Western Railway Company*, but that the repairs necessary for maintaining and keeping open the navigation had in every case been made by and at the expense of the proprietors for the time being of the canal.

Sir *H. James*, Q.C., and *O. L. Clare*, for the Plaintiffs:—

The statutory right to construct this canal, a right for which payment has been made, carried with it, as a necessary incident, the right to subjacent and adjacent support. It will, perhaps, be contended that their right to construct a canal is a mere easement—that is to say, a mere right to pass by a canal through certain lands; but the canal itself is a structure on the land, and that structure, authorized as it is by statute, and erected on land belonging to the same persons as the minerals below, carries the inherent right of common law support just as in the case of a railway: *Caledonian Railway Company* v. *Sprot* (1); *Elliot* v. *North Eastern Railway Company* (2).

Sir *H. Davey*, Q.C., *Rigby*, Q.C., *Renshaw*, Q.C., and *Warrington*, for the Defendants:—

The Plaintiffs are in the position of the conservators of a river; they have no right in the soil, but only a power to levy tolls for the use of the waterway. The intention of the Legislature under the Act 28 Geo. 2, c. viii., was merely to confer a right to the "navigation" of the river, assisted where necessary by cuts and canals; and there is no difference whether the canal consists of the original stream or of cuts and canals. The right of making a canal is a mere license to go over the land; it is not

(1) 2 Macq. 449. (2) 10 H. L. C. 333.

KEKEWICH, J. 1892 LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

even an easement: and by the Act compensation was to be given for damage in effecting or maintaining the navigation carried out under that license. The common law right of support cannot be attached to a mere license or easement: the right attaches to land only. We say that the surface of the land upon which the canal lies belongs to us and not to the Plaintiffs at all: *Hollis* v. *Goldfinch* (1). No soil was vested in the undertakers by the Act, and neither that nor either of the subsequent Acts contains any reference to mines and minerals. This right of making the canal being, then, only a license, can there be a further easement, such as a right of support, in aid of it? Not by prescription; because, in order to create an easement, there must be a dominant and a servient tenement; that is to say, land in two different persons. Nor is there any contract creating such an easement. In the two cases cited there was a grant of the surface for the purpose of making a railway, and in such a case the grantee has a right of support by common law, because the grantor has made the grantee the owner of the surface with the intention that he shall use it for a railway, and has received compensation for the surface so taken. Whether the surface is acquired by agreement or by the exercise of compulsory powers given by statute is immaterial: there is in either case a division of the land into two parts; but in the case of a mere license there is no such division, and the surface and the mines remain in the hands of the same person. Even in the case of a railway company, the company has no right of support unless it buys the subjacent minerals, and the mine-owner may therefore let down the railway. In *London and North Western Railway Company* v. *Ackroyd* (2), where the defendants granted the plaintiffs a right of tunnelling, it was held that this easement did not give the plaintiffs a right of support for their tunnel. If a man grants a right of way over his field, the grantee does not thereby obtain also a right of support for it; the grantor is at liberty to let down the surface so long as he does not actually destroy the right of way granted. In the Acts now in question there is not a word conferring upon the proprietors of the canal any right in the subjacent or adjacent minerals for any purpose whatever. In order to claim a right of

(1) 1 B. & C. 205. (2) 31 L. J. (Ch.) 588.

support the Plaintiffs must shew that it is given them by their Acts: they cannot bring in a supposed common law right. For instance, in *Metropolitan Board of Works* v. *Metropolitan Railway Company* (1), it was held that the Metropolitan Board of Works, in constructing a sewer under their statutory powers, did not acquire any right to lateral support, it not being given by statute.

[KEKEWICH, J.:—That case is commented on in *Roderick* v. *Aston Local Board* (2)].

We agree that it is quite possible that some damage may be done to the canal by working the subjacent minerals, and so causing a slight subsidence of the canal; but it is for the persons who derive a profit for the canal, and are empowered to "maintain" it for that purpose, to put it in repair.

To sum up our argument: the Plaintiffs' claim cannot be rested on the common law right of support, because there must be different owners. Nor is the right claimed *primâ facie* a right of necessity, and the words of the Act cannot be extended unnecessarily. To keep the canal navigable, it is not necessary that the Plaintiffs should have a right of support. Machinery is provided by the Act for assessing compensation for damage caused by carrying on or maintaining the "navigation," but it is not the intention of the Act to interfere with rights of property further than is mentioned, or to sacrifice the coal and other minerals of any person who may have obtained a comparatively trifling amount of damages for interference with his surface. The Plaintiffs have made out no case for an injunction, and, whatever may be their rights, they cannot restrain us from working the minerals belonging to us.

Clare, in reply:—

The grounds of the decision in *Metropolitan Board of Works* v. *Metropolitan Railway Company* were, first, that there was no necessity for implying a right of lateral support, inasmuch as it was possible to construct a sewer without it; and, secondly, that, there being in the Plaintiffs' Act no provision for compensating

(1) Law Rep. 3 C. P. 612; 4 C. P. 192.

(2) 5 Ch. D. 328, 332.

KEKEWICH, J.
1892
LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

adjoining owners, it was not the intention of the Act that any right of property should be taken away from them. That these were the grounds of the decision was pointed out by Sir *G. Jessel*, M.R., in *Roderick* v. *Aston Local Board* (1). But the general law is stated by Sir *Montague Smith* in the *Metropolitan Case* (2), where he observes (3) that, just as a grant of land for a house or a railway carries with it an implied right of reasonable and necessary support, as held by the House of Lords in *Caledonian Railway Company* v. *Sprot* (4), so the same principle is applicable to cases where an express right to construct anything on land is given by statute; and that statement of the law has never been dissented from since.

[KEKEWICH, J.:—Have you any other authority upon the neat point, as to whether you can claim a common law right of support?]

In *In re Corporation of Dudley* (5), it was held, distinguishing the *Metropolitan Case*, that the *Public Health Act*, 1875, imposes on landowners through whose land a sewer is run, an obligation to preserve to the sewer subjacent support. If a landowner is at liberty to remove subjacent support from the canal, he may equally remove the adjacent support of the banks, or place a chain across the canal. The reservation of mines to the landowner must be taken to be subject to the statutory right to make and maintain the canal: *Benfieldside Local Board* v. *Consett Iron Company* (6). A mine-owner working under a canal is bound to do no unnecessary or extraordinary damage to the canal, and is liable in damages for injury: *Dudley Canal Navigation Company* v. *Grazebrook* (7); *Knowles & Sons* v. *Lancashire and Yorkshire Railway Company* (8). There are two classes of cases as to the right to work mines under a railway or canal, namely, cases to which the *Railways Clauses Consolidation Act*, 1845, refers, and cases to which that Act does not refer. Before that Act, unless there was an express reservation of mines, the right to make a

(1) 5 Ch. D. 328, 333.
(2) Law Rep. 3 C. P. 612; 4 C. P. 192.
(3) Law Rep. 3 C. P. 626.
(4) 2 Macq. 449.
(5) 8 Q. B. D. 86.
(6) 3 Ex. D. 54, 63.
(7) 1 B. & Ad. 59.
(8) 14 App. Cas. 248.

railway or canal carried with it a right of support. After the Act, a different rule prevailed, for the mine-owner was restrained from working within certain limits, and if the company found it necessary to have the support of the minerals they had to pay for them: *Great Western Railway Company* v. *Bennett* (1). *Hollis* v. *Goldfinch* (2) was a different case from the present. There the ground of action was not damage to the canal, but cutting down trees on the bank: it had nothing to do with injury to the navigation. No distinction can be drawn between a case where the surface has been purchased for a railway or canal, and a case where there is only a right to carry a railway or canal over the land. Whenever you find a body of persons empowered by statute to construct and maintain public works, the necessary implication arises that the statute puts them in the same position and gives them the same rights—even though they have nothing but a right or easement to construct—as if there had been an actual grant, and nothing can be done in derogation of their statutory right.

[KEKEWICH, J.:—In *Wyrley Canal Company* v. *Bradley* (3), it was held that no action lay against the coal-owner for injury to a canal by mining, the injury having happened through the default of the company in not purchasing after notice by the coal-owner.]

In that case there was a canal Act expressly reserving the rights of mine-owners, and containing provisions for the purchase of the subjacent mines by the company. Moreover, the decision seems directly opposed to *Caledonian Railway Company* v. *Sprot* (4).

Rigby, in reply, upon the cases cited in reply:—

In *In re Corporation of Dudley* (5) there was a clear obligation, not a mere license, to lay down and repair sewers, and compensation was given for damage of every kind. The law is, that where you find a statutory obligation to construct works on another man's land, and to preserve and maintain those works, and

(1) Law Rep. 2 H. L. 27.
(2) 1 B. & C. 205.
(3) 7 East, 368.
(4) 2 Macq. 449.
(5) 8 Q. B. D. 86.

KEKEWICH, J. 1892 LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

to pay compensation, then, taking all that together, there must be a right of support. But where there is no obligation to construct, but a mere right to enter, and there is no right to compensation, there is no right of support. A right of support can only be implied from these three obligations—an obligation to make, to maintain, and to pay compensation; and they must be coincident in the same Act, not in several Acts: *Benfieldside Local Board* v. *Consett Iron Company* (1) is no authority on a case of this kind, for there the original Acts reserving the rights of the mine-owners did not apply to the mines under the highways, the highways not being the subject of allotment; see the suggestion of *Cleasby*, B., at the end of his judgment (2). In the later case of *Consett Waterworks Company* v. *Ritson* (3), the Court of Appeal thought that the decision in the *Benfieldside Case* (which was cited to the Court of Appeal, though not so stated in the report) rested on that suggestion; and in the *Consett Waterworks Case*, it was successfully contended, on appeal, that the mine-owners under the plaintiffs' reservoir were entitled to work their mines without liability to damages or compensation for injury to the reservoir by subsidence. Putting a chain across the canal would be a different case altogether, for the company are entitled to navigate the canal and to give a right of user in return for payment of tolls.

In *Dudley Canal Navigation Company* v. *Grazebrook* (4), the question was as to the construction of contradictory clauses in a canal Act.

Knowles & Sons v. *Lancashire and Yorkshire Railway Company* (5) is not a real report, only the judgment being given; but our view of the law is that taken by Lord *Macnaghten* (6), that the liability of the mine-owner continues until he protects himself by taking the course prescribed by statute. And *Wyrley Canal Company* v. *Bradley* (7), referred to by your Lordship, is to the same effect.

Great Western Railway Company v. *Bennett* (8), in which

(1) 3 Ex. D. 54.
(2) Ibid. 65.
(3) 22 Q. B. D. 318, 702.
(4) 1 B. & Ad. 59.
(5) 14 App. Cas. 248.
(6) Ibid. 256–7.
(7) 7 East, 368.
(8) Law Rep. 2 H. L. 27.

Dudley Canal Navigation Company v. *Grazebrook* (1) was approved, also shews that the right of support is taken away if notice is given by the landowner to the company, and the latter fails to make compensation.

1892. March 5. KEKEWICH, J.:—

The universal necessity of a precise statement of the question to be decided as a preliminary to decision finds apt illustration in this case. The Plaintiffs' claim was opened as depending on common law right, and the application of *Caledonian Railway Company* v. *Sprot* (2). The first observation on this position is that it is inconsistent with the pleadings. The common law right of support is a right of property based on the natural claim of every man to enjoy his own undisturbed by others, whether neighbours or strangers, and no question of construction of a grant, actual or presumed, by a particular neighbour enters into it. The statement of claim, however, insists on support to the canal only by subjacent soil, and such adjacent soil as at the date of the Act was vested in persons owners of land in or over which the canal was constructed; and this claim is obviously on grant, and on the principle which condemns any act in derogation of a grant. Reference to *Caledonian Railway Company* v. *Sprot* shews that that case was also decided on the same principle, and did not at all depend on common law right. This is apparent from Lord *Cranworth's* more general remarks (3), and again where he examines the judgment of the Court below, and applies the law to the particular case (4). These, my own comments, are fully justified by those of a more competent critic in *Fletcher* v. *Great Western Railway Company* (5). In truth, the greater part of the argument here rested on this basis, and I propose so to deal with it, regardless of any question of common law right, for which there seems to be no place. The instrument to be construed here is the Act of *George* II., which, although proceeding from the Legislature as paramount authority, and not directly from the proprietors of the soil, must,

(1) 1 B. & Ad. 59.
(2) 2 Macq. 449.
(3) 2 Macq. 451.
(4) Ibid. 461.
(5) 4 H. & N. 242, 253.

KEKEWICH, J.
1892
LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

I think, be read as equivalent to a grant by the latter; and my task is to determine what passed from them to the undertakers, and on what terms.

Reference was made in argument to later Acts, by virtue of which, first, other corporations, and ultimately the Plaintiffs, have been substituted for the original undertakers. Some new privileges have been conferred and some new duties imposed; but none of them purport to affect, or, I think, can be treated as affecting, the terms of the original grant so far as concerns the matter now under consideration, and I therefore propose to put them aside. There may also, I think, be safely put aside the documents shewing what payments have from time to time been made in the way of compensation by the proprietors of the canal. They are relevant to the case, which would not have been complete without them; but they must be treated as based on the Act, and referable to the rights and obligations arising thereout; so that, when once those have been ascertained, they become unimportant, except by way of illustration.

The real question is whether the grant by the Act of *George* II. of the right to make and maintain the canal, be it properly styled an easement or not, carries with it the right to prevent the grantors—meaning thereby the landowners on whose behalf the Legislature made the grant—from working their minerals to the detriment of the canal. Whether the Act of *George* II. is peculiar in the sense of standing alone, neither my own experience nor the information of counsel, enables me to say: but it is undoubtedly peculiar in the sense of being more or less broadly distinguishable from the modern form with which we are now familiar, and from any of the other forms through which that has by evolutionary stages at length been reached. In examining it, it is at least as important to notice what it does not, as what it does, contain. It authorizes the undertakers to make a canal, with all necessary works, converting the *Sankey Brook* into a navigable stream, and adding new cuts, with whatever else is required for perfecting the canal. There is also authority to maintain the canal, to keep it in all respects in good order, and to charge tolls for the user thereof. Although these powers postulate an authority to enter on, take, and occupy lands, and

such authority is expressly given, the undertakers are not empowered to purchase lands for any purpose. Persons under disability are authorized to sell, and to this extent it is contemplated that it may be convenient for the undertakers to acquire, and that they may acquire, land; but there is nothing pointing to the conclusion that the construction and maintenance of the canal will not be possible without acquisition of land, for which no compulsory power is given. And notwithstanding that the carriage of coal is noticed as one of the main objects of the undertaking, neither coal nor any other mineral is otherwise mentioned. The undertakers are bound to erect and maintain such fences, bridges, and other works, as are required for the accommodation of landowners whose enjoyment of their property would otherwise be disturbed by the construction and navigation of the canal; and they are bound to allow the canal to be used by the public on payment of tolls. I can discover no obligation on their part to maintain the canal as a waterway. There is, indeed this penalty imposed: if the canal be not constructed by a certain time, then it is provided, by sect. 36, that the power given by the Act to the undertakers may be transferred to others, the commissioners appointed by the Act being constituted an authority for this purpose; but, with this exception, the exercise of all the powers conferred is apparently left to depend on the self-interest of the undertakers. Ample provisions are made for compensation to landowners and others injured by the construction of the canal or by the navigation; but the injury contemplated, whether immediate or future, is restricted to this character, and remedies for injury, different or more extensive, are apparently remitted to the ordinary law of trespass. I do not pause here to consider in detail the language of the Act on this point; but, in connection with it, it is worth while to notice that a comparison of sects. 3 and 26 directly supports the above conclusion.

Such is the Act the provisions of which I have to apply to the determination of the questions arising between the Plaintiffs and Defendants. It is in many respects entirely different from any other Act which it has been my duty to consider, and it differs essentially from that which was considered by the House of Lords in *Knowles & Sons* v. *Lancashire and Yorkshire Railway*

KEKEWICH, J.

1892

LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

Company (1). It was there determined, and it was the critical point in the case, that, according to the Act construed by the House, if a mineral owner found that, having regard to the proximity of the canal and his statutory liability, he could not work without some danger, or could not work further to the same advantage as he could if the canal were not there, then it was open to him to initiate proceedings, and he was entitled to receive satisfaction for such minerals as should be thought proper to be left for the security of the canal or the mine. I find no provision in the Act of *George* II. which would justify the Court in placing a like construction upon it.

The question, then, to be determined resolves itself into this: Does a grant of such powers and privileges as above summarized carry with it, as a necessary incident, the right to such support as is required for the maintenance—not, be it observed, of the land granted, for there is none, but of the waterway to be constructed in exercise of those powers and privileges. If it does, that conclusion must be arrived at by an application of the principle that by a grant passes, without express mention, all that is necessary for the enjoyment of the grant. That, to my mind, is, if applicable, a more apposite principle than that a man must not derogate from his grant, though the latter, perhaps, has more frequently been put forward in cases bearing upon the point. In truth, it matters little which principle is applied, for, as regards the matter in hand, they mean the same thing, and one arrives at the same conclusion by applying either of them. Also, in order to apply either, one must examine the grant and be satisfied that it in substance allows that to be done.

The abstract question whether a grant of liberty to make and maintain a river, canal, or such like thing, in, through, or under land, carries the same right to support as a grant of property in the surface—which is the practical equivalent of a grant of the soil with a reservation of minerals—does not, to my mind, present any great difficulty. Each grant must alike be measured by the same principle—that, namely, above stated; and there is no good reason why a man should be allowed to derogate from one rather than the other. It may be that there is no decision

(1) 14 App. Cas. 248.

in favour of this conclusion, but there is none against it. *Montague Smith* puts it plainly enough in his judgment in *Metropolitan Board of Works* v. *Metropolitan Railway Company* (1); and *Cleasby*, B., expresses the same opinion in the same case on appeal (2). Nor do I understand the majority, either in the Court below or in the Exchequer Chamber, to have differed from them in this respect. Read the judgments of Mr. Justice *Denman*, the Master of the Rolls, and Lord Justice *Cotton*, in *In re Corporation of Dudley* (3), as directed to the special legislation before them, and to the special facts and circumstances affected by such legislation, and you observe no necessity for difference or urgency for supposing a difference on an abstract question. Here, in truth, is to be found the solution of other apparently conflicting opinions on which one side or the other in this case relied. It cannot be overmuch insisted on that, as the opinion of counsel must be read with reference to the case stated, so must a judgment be interpreted by the light of the facts and arguments which are before the Court.

General principles and rules are sometimes expressed, sometimes implied; but the main purpose of these judgments is to expound what differentiates the case in hand from every other, and to apply general principles and rules to a position thus ascertained. What are the terms of the particular grant? What property and rights does it pass to the grantee? What liabilities does it impose on the grantor? These are the questions to be answered, and the answer to which is given, whether proprietorship in the soil, or powers and privileges connected with it, be under consideration. So it is in *Caledonian Railway Company* v. *Sprot* (4), and *Elliot* v. *North Eastern Railway Company* (5), instances of conveyances; and so it is in the *Metropolitan Board of Works* v. *Metropolitan Railway Company* (6), in *In re Corporation of Dudley* and in others to be presently mentioned.

In *Caledonian Railway Company* v. *Sprot*, the law is stated respecting a conveyance for value with a reservation of minerals,

(1) Law Rep. 3 C. P. 612.
(2) Ibid. 4 C. P. 197.
(3) 8 Q. B. D. 86.
(4) 2 Macq. 449.
(5) 10 H. L. C. 333.
(6) Law Rep. 3 C. P. 612; 4 C. P. 192.

KEKEWICH, J.
1892
LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

and the value given and received was held to include compensation for the deprivation of mineral profits there in question. In *Elliot* v. *North Eastern Railway Company* (1), there was undoubtedly a question whether the railway company were entitled to adjacent as well as subjacent support, it being contended by the landowner that the latter was alone reserved by the conveyance incorporating the special provisions of an Act of Parliament; but although the right to this adjacent support was upheld, on the ground that, what Lord *Kingsdown* styles (2) ordinary legal incidents attached to the land conveyed, even this turned on the grant which was construed not to preclude that result. The conclusion arrived at in *Metropolitan Board of Works* v. *Metropolitan Railway Company* (3) was due to there being no such compensation clause in the Act of Parliament under which the sewer was constructed as there is in the *Public Health Act*: *per* Lord *Esher*, M.R. (4); and that in *In re Corporation of Dudley* (5) to the compensation clause found in the latter Act. Lord *Esher* calls particular attention to the obligation to construct a sewer, and the obligation in favour of landowners to repair, which is further accentuated by *Cotton*, L.J.; and Lord *Esher* insists (6) on the corresponding compensation for the burden laid on the landowner in terms plainly indicating that, without it, the right of support would have been claimed in vain. The form in which the question in consideration is stated in the commencement of Lord *Esher's* judgment (7), strongly corroborates that view.

Dudley Canal Navigation Company v. *Grazebrook* (8), being a case concerned with a canal, must not pass unmentioned; but the decision turned on the construction of an Act of Parliament which, besides being extremely difficult by reason of conflicting clauses, was wholly unlike that now under consideration. Observe, however, that *Bayley*, J., who delivered the judgment of the Court, says of the canal company (9): "They have no

(1) 10 H. L. C. 333.
(2) Ibid. 363.
(3) Law Rep. 3 C. P. 612; 4 C. P. 192.
(4) 8 Q. B. D. 95.
(5) 8 Q. B. D. 86.
(6) Ibid. 94.
(7) Ibid. 92.
(8) 1 B. & Ad. 59.
(9) Ibid. 69.

rights except what were given by that Act; the defendants had the property in the soil and mines, and all the rights of enjoying that property before the Act, and they still retain all that the Act has not taken away." This, I venture to say, is a clear enunciation of the right principle to be applied to the ascertainment of the relative rights of railway or canal proprietors and landowners under that or any other Act of Parliament.

Great Western Railway Company v. *Bennett* (1) might have been mentioned with the cases on conveyances, but has been reserved to this place because of the express approval there by the Lord Chancellor of the decision last cited. This is a case frequently and properly quoted with reference to questions arising under the *Railways Clauses Consolidation Act*, which Lord *Cranworth* said was intended to create a new code as to the relation between mine-owners and railway companies where lands are compulsorily taken for the purpose of making a railway; but it has no particular application to an Act of Parliament such as is now being considered, which is one of an entirely different character.

The Plaintiffs place some reliance on *Benfieldside Local Board* v. *Consett Iron Company* (2), and if one could properly treat that case as one of general application to instances of the appropriation of land for canals, highways, or other like public purposes, it would certainly be an authority in their favour. But, notwithstanding the somewhat comprehensive language of *Kelly*, C.B., I think that the case cannot be so treated. Mr. *Rigby* stated that, on the hearing of the appeal in *Consett Waterworks Company* v. *Ritson* (3), the Court was satisfied that the *Benfieldside Case* really depended on the suggestion—for it is no more—in the concluding paragraph of Baron *Cleasby's* judgment. The report does not mention this, or even shew that the *Benfieldside Case* was cited; but Mr. *Rigby* invited me to satisfy myself of the conclusion at which he said the Court of Appeal had arrived. Having studied the judgments of *Kelly*, C.B., and *Cleasby*, B., I do not think that it would be right of me thus to treat them; but, on the other hand, I must, according to the rule laid down in an earlier part

(1) Law Rep. 2 H. L. 27. (2) 3 Ex. D. 54.
(3) 12 Q. B. D. 318, 702.

KEKEWICH, J. 1892 LONDON AND NORTH WESTERN RAILWAY CO. v. EVANS.

of this judgment, construe their statements, however general, with direct reference to the facts and circumstances before them; and it is impossible not to see that they were dealing with circumstances of an extraordinary character, or to hold them to have stated for general application propositions of law not required, if I may respectfully say so, for the purposes of the case before them.

The other cases cited in argument I do not propose specifically to notice. It will be found on reference that they all fall within one or other of the classes of authorities with which I have dealt, and no one of them seems to contain anything specially deserving mention.

We must now turn back to the Act of *George* II., and apply to the construction of it the learning gathered from an investigation of the foregoing authorities. Consistently with those authorities, how can the Plaintiffs be held entitled to the relief claimed? Treating, as I do, the grant of liberty to maintain the canal in, over, and through the land of the Defendants as equivalent for this purpose to a grant of the surface with a reservation of minerals, how can the Defendants be held to be deprived of the enjoyment of the minerals in the only practical form in which enjoyment is possible? There is no obligation to construct or maintain the canal. There is no obligation in favour of the mineral-owner to repair it, and there is no obligation to give him compensation for the minerals of which he is deprived. The Plaintiffs, pressed by the absence of any provision for compensation, admit that they are bound to give it. They do not, however, admit that the Defendants are at once entitled to compensation for the minerals, which, according to the contention, the Defendants cannot work; and they are unable to indicate any power on the Plaintiffs' part to initiate proceedings to assess the compensation payable, or, indeed, to point to any provision in the Act for assessing compensation at all. They seek to make Parliament—I use Lord *Esher's* phrase —"unjust"; and that result, which must at least be regarded as highly improbable, must not be concluded without clear enactment, of which there is no trace. What the Defendants are at liberty to do, and to what liabilities, if any, they may subject

themselves if they work their minerals so as to destroy the canal, I do not, because I need not, determine. What I hold is that, for the reasons given, the Plaintiffs are not entitled to the injunction asked. Their claim fails, and there must be judgment for the Defendants with costs.

Solicitors: *C. H. Mason; Paterson, Snow, Bloxam, & Kinder* agents for *W. H. Brook, Warrington, Lancashire.*

G. I. F. C.

ROMER, J.

1892

April 28.

ELKINGTON & CO. *v.* HÜRTER.

[1891 E. 80.]

Principal and Agent—Company—Director—Representation—Liability.

The Plaintiffs contracted to supply goods to a company to be paid, as to £600, in first mortgage debentures of the company, and as to the balance by the company's acceptances. The contract was made at a board meeting of the company at which the Defendant was chairman, and which was attended by the Plaintiffs' representative. The Plaintiffs repeatedly pressed for their debentures, and were put off by promises contained in letters written by the secretary of the company with the knowledge of the Defendant as a director; but eventually the company was ordered to be wound up without the Plaintiffs having obtained their debentures. At the time the contract was made the Defendant knew that the whole of the first mortgage debentures of the company had been issued except £4950, which were deposited with the bankers of the company as security for the company's overdraft (which was also guaranteed by the directors) under an arrangement by which the company could at any time withdraw any of the debentures on paying the nominal amount thereof in cash. In an action by the Plaintiffs to make the Defendant personally liable for the £600 on the ground that his acts were a representation that he had authority to say the company could issue the debentures at a time when he knew they had no debentures available for the purpose:—

Held, that the Defendant was not liable.

Firbank's Executors v. *Humphreys* (1) distinguished.

THE Defendant was a director of *The Tivoli, Limited*, which carried on the business of a restaurant, and in the beginning of the year 1890 negotiations were entered into between the Plaintiffs and the directors of *The Tivoli, Limited*, for the supply of plate, cutlery, and other similar goods by the Plaintiffs to *The Tivoli, Limited*. On the 28th of March, 1890, the Plaintiffs' representative attended the board of directors of *The Tivoli, Limited*, when an offer was made by the board to pay to the Plaintiffs half the amount of the invoice of the goods to be supplied by them by first mortgage 6 per cent. debenture bonds of the company, and the other half by the company's acceptances. On this occasion the Defendant was the chairman of the board

(1) 18 Q. B. D. 54.

of *The Tivoli, Limited,* and signed the minutes. This offer was accepted by the Plaintiffs by letter dated the 1st of April, 1890, and addressed to the secretary of *The Tivoli, Limited,* and by him reported to a board meeting held the same day, at which the Defendant was present; and on the same 1st of April the secretary, by the direction of the Defendant, wrote the Plaintiffs: "I am duly in receipt of your letter of to-day's date accepting the order for plate, cutlery, &c., required for the new *Tivoli* building. I am instructed by my directors to confirm the same." The price of the goods supplied by the Plaintiffs to the *The Tivoli, Limited,* upon the faith of the said agreement, amounted to £1307 13*s.* 6*d.*, for which the company gave to the Plaintiffs two acceptances of £600 and £107 13*s.* 6*d.*, and the balance of £600 was to be paid by debentures as above stated. The acceptance for £107 13*s.* 6*d.* was paid, but that for £600 was dishonoured. The Plaintiffs repeatedly applied for delivery to them of the debentures, and the secretary of *The Tivoli, Limited,* by the instructions of the Defendant as a director, on several occasions promised that such debentures should be delivered, in particular, by letter dated 14th of July, 1890, he wrote: "I duly laid your letter of Saturday's date before my directors at their meeting this morning. I regret I have not been able to send you the £600 debentures. I am to assure you, however, that the whole matter shall be adjusted this week"; and, again, on the 25th of July, he wrote: "The debentures I hope to let you have at an early date." In November, 1890, *The Tivoli, Limited,* was ordered to be wound up on a creditor's petition. The Plaintiffs, after stating the above facts in their statement of claim, alleged that the Defendant was always well aware that there were no debentures available to satisfy the Plaintiffs' claim; but, notwithstanding this, he knowingly caused such representations as aforesaid to be made to the Plaintiffs for the purpose of obtaining the said goods for the company, and he induced them to part with their goods to the said company (as they in fact did) upon the faith of such representations; and the Plaintiffs claimed that the Defendant might be ordered to make good to them the £600 with interest.

The Defendant, by his statement of defence, denied the allegations in the statement of claim, and pleaded that throughout the

ROMER, J. 1892 ELKINGTON & Co. v. HÜRTER.

transactions he acted as a director and agent only of *The Tivoli, Limited*, and not on his own behalf, and that the Plaintiffs well knew he was so acting and dealt with him on that footing. He also relied on the *Statute of Frauds*, s. 4, and on the statute 9 Geo. 4, c. 14, s. 6.

At the trial the facts above detailed in the statement of claim were admitted. It also appeared that at the time when the contract was made with the Plaintiffs the company had an issue of £70,000 in first mortgage debentures, of which £65,050 had been issued to various persons, and the balance of £4950 had been deposited with Messrs. *Coutts & Co.*, bankers, as security for the company's overdraft, which was personally guaranteed by the directors, under an arrangement by which the company could at any time withdraw any of the £4950 debentures on paying the bank the nominal amount thereof in cash; and that the Defendant knew these facts.

Chadwyck Healey, Q.C., and *E. Ford*, for the Plaintiffs:—

What took place on the 28th of March, 1889, coupled with the subsequent letters, amounted to a representation by the Defendant that he had authority to state that the company could and would issue these debentures to the Plaintiffs, when the Defendant well knew that the company had no debentures available for the purpose, and brings the case within the principle of *Collen* v. *Wright* (1) and *Firbank's Executors* v. *Humphreys* (2). The Defendant, therefore, must make good his representation, and the damage is the nominal amount of the debentures—*viz.*, £600.

Haldane, Q.C., and *T. Willes Chitty*, for the Defendant:—

The cases cited do not apply. In *Firbank's Executors* v. *Humphreys*, the directors acted *ultrà vires* in issuing the debentures. Here the company had power to make the contract, and had debentures which could have been made available for the purposes of the contract. If there was a representation by the Defendant at all, it was a representation honestly made that the company would at a future date issue these debentures to the

(1) 8 E. & B. 647. (2) 18 Q. B. D. 54.

Plaintiffs, and it was the company that failed to complete its contract. The Defendant, therefore, is not liable. The Plaintiffs are really trying to make the Defendant liable as a guarantor; but no such contract is pleaded, and further, such a guarantee must be in writing: *Statute of Frauds*, s. 4. Neither is it a case of breach of warranty of authority or of estoppel: *Low* v. *Bouverie* (1).

Chadwyck Healey, in reply:—

The company never were in a position to redeem the debentures pledged with their bankers, and the acts of the Defendant were a representation that he had authority to say that the company would issue the debentures at a time when he knew that the company could not issue them.

ROMER, J.:—

It appears to me that I must, on the facts, dismiss this action. I cannot see upon what legal ground I can make the Defendant liable. It is admitted that it is not a case of guarantee on his part that his company would carry out a contract with the Plaintiffs. It does not appear to me that it is a case of warranty of authority on his part when, in fact, he had no authority to enter into the contract with the Plaintiffs. It is not a case of deceit; it was not opened as such. Admittedly it is not a case of fraud; it is not a case of estoppel; it is not a case of breach of duty; and since the case of *Low* v. *Bouverie* the Plaintiffs could not base their claim in reliance upon the equity which was laid down in the case of *Slim* v. *Croucher* (2). It seems to me that the case of *Firbank's Executors* v. *Humphreys* (3) is clearly distinguishable. There the directors contracted to issue certain debentures, and it turned out that they had no power to issue them. It was, therefore, not unnatural that the directors by issuing invalid debenture certificates were held to have implied and represented that they had authority to issue them when in fact they had no such authority. Here, there were debentures which might have been made available for the

(1) [1891] 3 Ch. 82. (2) 1 D. F. & J. 518.
(3) 18 Q. B. D. 54.

ROMER, J.
1892
ELKINGTON & Co. v. HÜBTER.

purpose of the contract. I hold, therefore, that the Defendant is not personally liable, and that this action must be dismissed; but, under all the circumstances of the case, I dismiss it without costs.

Solicitor for the Plaintiffs: *W. Foster.*
Solicitor for the Defendant: *E. Kennedy.*

H. L. F.

In re NATIONAL WHOLEMEAL BREAD AND BISCUIT COMPANY.

VAUGHAN WILLIAMS, J.

1892

May 21, 28.

[41 of 1891.]

Company—Winding-up—Official Receiver acting as Liquidator—Rejection of Proof—Appeal—Jurisdiction of Liquidator to consider Set-off—Costs—Companies (Winding-up) Rules, 1890, *rr.* 110, 111, 112, 178—*Companies (Winding-up) Rules*, 1892, *r.* 3.

Appeals from the Official Receiver, which by rule 3 of the Companies (Winding-up) Rules, 1892, are to be heard before the Judge in open Court, are only appeals from the Official Receiver acting as such, and do not include appeals from the Official Receiver when acting as liquidator; applications by way of appeal from his decisions as liquidator must be made in Chambers.

A liquidator, when examining a proof of debt with a view to its admission or rejection, is entitled also to examine a set-off to such proof, if it is a matter of account, in order to arrive at the amount, if any, for which the proof is to be allowed.

On a successful appeal from the rejection of a proof in the winding-up of a company, the rule in bankruptcy is followed, that the applicant is allowed his costs, not of the proof, but of the appeal, out of the assets.

AN order having been made for the winding-up of the *National Wholemeal Bread and Biscuit Company, Limited*, *Thomas Baines* claimed to prove in the winding-up for £23 10*s.* 9*d.*, the balance of moneys alleged to have been advanced by him on account of the company, according to its petty cash-book.

On the 7th of May, 1892, the Official Receiver and Liquidator gave *Baines* a written notice (Form 68) that he had rejected the claim for £23 10*s.* 9*d.* on the following grounds: "On or about the 17th of January, 1891, a payment of £153 was made to you in respect of balance of salary up to the 2nd of October, 1891. Your connection with the company was terminated on the 9th of May, 1891, and you have, therefore, received, after allowing you one month's salary in lieu of notice, £64 1*s.* 11*d.* in excess of the amount due, and are indebted to the company in that amount."

On the 14th of May, 1892, *T. Baines* served notice of motion, that his proof for £23 10*s.* 9*d.* might be allowed in full; and that the costs of the Appellant, of and incident to the proof of

VAUGHAN WILLIAMS, J.

1892

In re NATIONAL WHOLEMEAL BREAD AND BISCUIT COMPANY.

his said claim and this appeal, might be paid to him out of the assets of the said company.

By his evidence in support, the Applicant alleged that on the 2nd of October, 1890, he was appointed secretary *pro tem.* of the company, his remuneration to be fixed thereafter; that on the 11th of December, 1890, he was appointed permanent secretary at an annual salary of £200, to commence on the 2nd of October, 1890; that in January, 1891, he demanded of the company, in consideration of his continuing his services as secretary, that at the least one year's full salary of £200 remaining, after giving credit for the amounts then already paid to him in respect of salary, should be forthwith paid to him by the said company; that the directors, on the 17th of January, resolved to comply with this demand in order to retain the Applicant's services for the year, and that a cheque in his favour for £153 was signed by the directors and paid to the Applicant; that the Applicant gave his services as secretary till the 9th of May, 1891, the date of the winding-up order, and was prepared to continue them till the 2nd of October, 1891 (the full year of service), and had not been in any other employment in the meantime; that the £23 10*s.* 9*d.* was due at the date of the winding-up for out-of-pocket expenses paid for the benefit of the company; also, that at the date when the cheque was received the company had more than enough money in the bank wherewith to pay its trade debts, and was perfectly solvent.

The principal ground of set-off relied on by the liquidator was that the arrangement between the Applicant and the company was not a proper and binding one.

The motion came on for hearing on the 21st of May, 1892.

Oswald, in support of the motion :—

The appeal is from the decision of the Official Receiver rejecting the proof.

[VAUGHAN WILLIAMS, J. :—Why is it brought into Court ?]

Rule 3, clause 1 (*b*), provides that "appeals from the Board of Trade and Official Receiver to the High Court" shall be heard by the Judge "in open Court."

VAUGHAN WILLIAMS, J. :—

I shall in future only allow such applications to be made in Court when they affect the Official Receiver as such. As I read rule 3, clause 1 (*b*), the words "appeals from the Board of Trade and Official Receiver" refer to appeals from the Board of Trade and Official Receiver acting as Board of Trade and Official Receiver, and if an appeal is brought from the decision of the Official Receiver acting as liquidator, the application must be made in Chambers. I will allow the matter to be adjourned into Chambers and hear it to-day; but in future, having regard to rule 3 of 1892 and rule 97 of 1890, such applications must be made in Chambers. I do not think there is any reason why the Official Receiver should not instruct counsel.

Oswald :—No counsel has been instructed; and I should have objected that the Official Receiver could not himself argue the question in Court.

VAUGHAN WILLIAMS, J. :—I am not dealing with that question now.

The application was subsequently adjourned from Chambers to Court, and was heard on the 28th of May.

Oswald, in support of the application :—

The amount claimed has been disallowed on the ground that the company has a right of set-off for a larger amount. But the liquidator has only jurisdiction to examine the proof of the creditor. If the liquidator has a disputed claim to a set-off, he cannot examine that with a view to reducing the amount of the proof, but must give notice and have the question properly tried. A second objection is, that the proof is under an express contract, and is for a sum admitted to be correct, and the alleged right of set-off is on the ground of fraudulent preference, and that the Board of Directors was not properly constituted. By rule 110 of the Companies (Winding-up) Rules, 1890, "the liquidator shall examine every proof and the grounds of the debt, and in writing admit or reject it, in whole or in part." Rule 111 provides, that if a creditor is dissatisfied with the decision of the liquidator in

VAUGHAN WILLIAMS, J.

1892

In re NATIONAL WHOLEMEAL BREAD AND BISCUIT COMPANY.

respect of a proof, the Court may, on his application, reverse or vary the decision. Rules 112 and 113 give the Court power to expunge and reduce the amount of proof; and rule 115 extends the powers of the liquidator to the Official Receiver while acting before the liquidator is appointed. The liquidator has no further powers under the Rules of 1890; and rule 178 provides that where no other provision is made by the *Companies (Winding-up) Act*, 1890, or the Rules of 1890, the practice shall, unless it is otherwise specially directed, be in accordance with the Rules of the Supreme Court and the practice of the High Court. By rule 23 of the General Order of November, 1862, at the time appointed for adjudicating upon debts and claims, the Judge may allow them on the affidavit of the liquidator, or require them to be proved, and adjourn the adjudication thereon. The liquidator's duty was to simply admit this proof, subject to such proceedings as the Judge might direct for the trial of the question of the alleged set-off.

Bramwell Davis, for the Official Receiver:—

Independently of fraudulent preference, there is a good set-off to the claim.

[VAUGHAN WILLIAMS, J.:—I am against you on the question of fraudulent preference being a matter of set-off. The position of the liquidator is very like that of a trustee in bankruptcy. He may allow anything as a set-off which is a matter of account; but he must not avoid or rescind an agreement.]

He may act as a Judge with regard to proofs. When a company is being wound up, whether an action is brought by the company or a proof is carried in by a creditor, a set-off of a liquidated sum is always admissible: *Buckley* on Companies (1).

VAUGHAN WILLIAMS, J.:—

I hold that for the purposes of to-day the set-off is admissible upon the examination of the proof by the liquidator for the purposes of the account which he has to take in order to arrive at the amount, if any, for which the proof is to be admitted.

(1) 6th Ed. p. 357.

The application was then heard, and the proof was admitted, subject to liberty given to the liquidator to apply to expunge the proof, if so advised, in case anything further should come to the liquidator's knowledge. Following the practice in bankruptcy, the Applicant's costs (not of the proof, but of the application only) were ordered to be paid out of the assets of the company.

Solicitors: *F. Bradley; Newson & Dunn.*

F. E.

C. A.

1892

KEKEWICH, J.

March 18; *April* 1.

C. A.

May 24.

In re KING & CO.'S TRADE-MARK.

Trade-mark—Rectifying Register—Motion to expunge Registered Proprietor domiciled out of Jurisdiction — Service — Irish Jurisdiction — Patents, Designs, and Trade Marks Act, 1883, *ss.* 62 *sub-s.* 6, 90, 107–111, 117—*Practice — Notice of Motion — Amendment — New Notice of Motion — "Commencement" of Matter—Marking with Judge in Rotation—Affidavits—Irregularity — Filing after Motion disposed of—Entering in order as read—Rules of Supreme Court*, 1883, *Order* v., *r.* 9 (*c*).

The High Court of Justice in *England* has jurisdiction, under the *Patents, Designs, and Trade Marks Acts*, 1883 and 1888, to rectify the register of trade-marks kept under those Acts, notwithstanding that the registered proprietor of the mark affected is domiciled in *Scotland* or *Ireland*. Whether the Scotch or Irish Courts have a concurrent jurisdiction with the English Courts to rectify the register, *quære*.

No special procedure is prescribed by the Acts or rules as to the service on parties interested of notice of application to expunge a trade-mark. Therefore it is sufficient if such notice is given as is required by natural justice.

Where the registered proprietor of a trade-mark registered in *England* under the *Patents, Designs, and Trade Marks Act*, 1883, was a British subject domiciled in *Ireland*, out of the jurisdiction of the English Courts and therefore could not be served with a notice of motion to expunge the trade-mark, it was *held* sufficient to send him a copy of the notice of motion with a letter informing him that proceedings had been commenced which might affect his interests; and the Court heard the motion and made an order, although the registered proprietor did not appear. The decision of *Kekewich*, J., affirmed.

Per Kekewich, J.: Where proceedings for expunging a trade-mark have been commenced by notice of motion, the subsequent alteration or amendment of the notice in a mere matter of detail not affecting the nature of the relief claimed, such as by striking out the name of a respondent improperly added, or by changing the date for the hearing of the motion, does not make it a new notice of motion requiring to be taken to the Writ Department of the Central Office to be re-marked with the name of the Judge in rotation, under Rules of Supreme Court, 1883, Order v., r. 9 (*c*), or requiring the leave of the Court to use at the hearing affidavits filed prior to the alteration or amendment.

An affidavit used on a motion, but not filed until afterwards, may be entered in the order as read, even though the fact of its not having been filed has not been brought to the notice of the Court, provided it does not interfere with the date of the order, as where the filing is on the same day.

ON the 27th of February, 1889, *Frederick King & Co., Limited*, an Irish company incorporated under the *Companies Acts*, and

having its registered office in *Belfast*, but with a branch office in *London*, registered under the *Patents, Designs, and Trade Marks Act*, 1883, the words "*Desiccated Soup*" as a trade-mark that had been used by them and their predecessors in business—that of provision merchants—twenty years before the date of registration. Both the company's addresses in *Belfast* and *London* were entered in the *Trade Marks Journal*.

This was a motion on behalf of a rival firm of provision merchants in *London*, trading as "*The Pure Beef Company*," to expunge *Frederick King & Co.'s* trade-mark from the register. The latter company, with the Comptroller-General, was originally named as a respondent to the notice of motion, which was for the 8th of March, 1892; but as the company was an Irish company, and therefore could not be served with the notice of motion, the Applicants amended the notice by striking out the company's name, and then adopted the course suggested by Mr. Justice *Stirling* in *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer* (1), serving the Comptroller-General with a notice of motion for the 18th of March, and sending a copy of it to the company's office in *Belfast* with a letter intimating that the copy was sent to inform them that proceedings had been commenced which might affect their interests.

The company did not appear to the motion, and the only question calling for a report was whether the Court had jurisdiction to hear such a motion in the absence of the owners of the trade-mark.

Evidence was filed by the Applicants to shew that the trade-mark in question was not an old mark in use before the *Trade Marks Registration Act*, 1875.

The motion came on for hearing before Mr. Justice *Kekewich* on the 18th of March, 1892.

Warmington, Q.C., and *Swinfen Eady*, for the Applicants:—

We submit that, having given *Frederick King & Co.*, the owners of the trade-mark, informal notice of the proceedings, as suggested by Mr. Justice *Stirling* in *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer*, which apparently

(1) [1891] 3 Ch. 451.

C. A. 1892 — *In re* KING & Co.'s TRADE-MARK.

we could do without first obtaining the leave of the Court, we are now entitled to proceed with the motion against the Comptroller-General, notwithstanding the absence of the company.

Ingle Joyce, for the Comptroller-General:—

From my point of view it is convenient to try the case in *London*, and I contend that the jurisdiction is here and nowhere else: *Patents, Designs, and Trade Marks Act*, 1883, s. 62, sub-s. 6; ss. 90, 111, and 117; *Patents, Designs, and Trade Marks Act*, 1888, s. 8.

[KEKEWICH, J., referred to *Kinahan* v. *Kinahan* (1).]

There is no section in the Act actually requiring that the owner of the trade-mark shall be served with a notice of motion of this kind, though, under the general law, it is the practice to serve the person whose interest is affected; and if the owner of the trade-mark does not choose to appear and defend it, it is in the discretion of the Court either to proceed in his absence or not.

Hopkinson, Q.C., said he held a watching brief for *Frederick King & Co.*, and, though the company did not appear on the motion, they not being parties to it, proposed to argue the question of jurisdiction alone, apart altogether from the merits of the case.

[KEKEWICH, J.:—I cannot hear you upon any question unless the company consents to be added as a party and to appear in the usual way. If you appear at all, it must be as an ordinary litigant, and subject to all the consequences of such a position.]

Hopkinson repeated that he did not wish to appear, except under protest, for the purpose of arguing the question of jurisdiction alone.

KEKEWICH, J.:—

This is a motion to remove a trade-mark from the register. The registered owners of the trade-mark appear to be a company having their registered office in *Ireland*, but also having a regis-

(1) 45 Ch. D. 78.

tered address, according to the *Trade Marks Journal*, in *London*. Under those circumstances, the Applicants being in a position of difficulty, not being able to serve the company in *London*, because that is not the place of their domicil, and not being able to serve them in *Ireland*, because there is no power in the Court to give leave to serve a notice of motion of this character out of the jurisdiction, they adopted the course of serving the Comptroller only, and giving an informal notice to the company: I mean informal in this sense, that they did not purport to serve them with a notice of motion, such as was served, and held to have been wrongly served, in the case before Mr. Justice *Stirling*, but they gave the company a plain intimation of the character of the motion intended to be made, and of the time when it would be made, and so forth, in order that they might have an opportunity of appearing. To my mind that was the right course to pursue. It is quite true that, in the case before Mr. Justice *Stirling*, after he had held that the service was wrong, he, on a further application, suggested what ought to be done, and to that extent the intimation given to the respondents was given with the leave of the Court. But Mr. Justice *Stirling* having so stated what was right to be done, I do not think it is necessary to apply for the leave of the Court in any other case of a similar character. My recollection is that, in more than once instance, where it was convenient that a foreign ambassador should know of proceedings with which he could not possibly be served because of the respect due to the ambassador's residence, an intimation of this kind was given, and, when given, sometimes did and sometimes did not lead to appearance; but I do not think it was ever suggested that an intimation of that kind could not be given without leave of the Court. At any rate, I do not think that Mr. Justice *Stirling* meant, and I do not read him as meaning, that it is necessary to come to the Court for leave to serve what I have called an "intimation," which is not a proceeding in the action, and not open to the objections which a notice of motion is open to. So far, therefore, I think the Applicants are right in the course they have taken.

Then the Respondents, the owners of the registered trade-mark, do not think fit to appear. That is a matter entirely of

C. A. 1892 *In re* KING & Co.'s TRADE-MARK. Kekewich, J.

their own concern. They have had an opportunity of doing so, and they wish to appear, under protest, to argue the question of jurisdiction. On reflection, I do not think that is a convenient course. I think it might lead to a good deal of trouble. In my opinion, if they appear at all, they must appear and submit to the jurisdiction, although then they might still argue that the Court has no jurisdiction; but they must submit to the jurisdiction to this extent—that they must run the risk of being found entirely wrong, with the proper and usual results. Therefore, as they do not appear, I have to decide this case in their absence, and only with such assistance, in addition to the case made by the Applicants, as the Comptroller can give me. Still, I have to consider the question of jurisdiction.

The jurisdiction is a statutory one given by the Act of 1883, and the 90th section of that Act says that "the Court" may, on the application of any person aggrieved, expunge an entry on the register. There is a definition of "the Court" in sect. 117, where it is stated to mean "Her Majesty's High Court of Justice in England." Therefore, so far, there is no difficulty in assuming jurisdiction. But that definition is made "subject to the provisions for *Scotland*, *Ireland*, and the *Isle of Man*"; and there is some difficulty in ascertaining what those provisions are. I have had the assistance of the Comptroller, and I believe that all the sections which are of any importance as bearing upon the point before me have been pointed out to me. The section that raises the main difficulty is sect. 111, which seems to me a little confused and puzzling in its language. It says: "The provisions of this Act conferring a special jurisdiction on the Court as defined by this Act, shall not, except so far as the jurisdiction extends, affect the jurisdiction of any Court in *Scotland* or *Ireland* in any proceedings relating to patents or to designs or to trade-marks." That jurisdiction might be a jurisdiction given by the Act, or a jurisdiction independently of the Act. I am not aware of any special jurisdiction, as regards trade-marks at any rate, which could come within the jurisdiction of any Court in *Scotland*; but still I think the jurisdiction there referred to may be a jurisdiction independently of the Act, and I am not prepared to say how extensive that jurisdiction may be.

What is true of *Scotland* is equally true of *Ireland*, and I need not repeat it. There are sections which refer to *Scotland* and *Ireland* respectively, besides sect. 111, or at any rate which refer to *Scotland*. There is what in the House of Lords is called a *fasciculus* of clauses, commencing with the 107th and ending with the 112th, which are included under the heading "*Scotland*, *Ireland*, &c." The 107th is expressly limited to an action for infringement of a patent in *Scotland*; and we all know that actions for infringement of patents are continually tried in *Scotland*, and often find their way to the House of Lords. There can be no doubt that there is jurisdiction in *Scotland* for that purpose, and there must be actions of a similar kind in *Ireland*.

Then the 108th section says, "In *Scotland* any offence under this Act declared to be punishable on summary conviction may be prosecuted in the Sheriff Court." That is to say, an offence under the Act, and not proceedings for expunging a trade-mark or anything of that kind.

Then the 109th section also refers to proceedings in *Scotland*; and the 110th section says, "All parties shall, notwithstanding anything in this Act, have in *Ireland* their remedies under or in respect of a patent as if the same had been granted to extend to *Ireland* only." Now, although it is not necessary for me to decide the point, it seems to me that the reservation in the interpretation clause, sect. 117, would be sufficiently construed by referring it to the jurisdiction of the Scotch and Irish Courts respecting patents. Then, if that were so, the proceedings relating to patents, or to designs, or to trade-marks, in sect. 111, might very well refer to proceedings for enforcing the proprietory rights in patents, designs, or trade-marks, or to offences against the Act punishable by summary or other conviction, without touching in any way the jurisdiction of the High Court of Justice to expunge a trade-mark from the register or to rectify it. But it is not necessary, I say, to go so far as that. Whatever the jurisdiction of the Irish Courts may be, into which I cannot further go, it seems to me reasonably clear that this Court has jurisdiction. It may or may not be exclusive, but I think it must at least be concurrent; and while, if there be a jurisdiction in the Irish Court, that jurisdiction is not dealt with by the Act,

C. A. 1892 — *In re* KING & Co.'s TRADE-MARK. — Kekewich, J.

yet there remains the jurisdiction in the High Court of Justice. Therefore, it seems to me that I have jurisdiction if a case is made out for me to exercise it.

Then it has been suggested that it might not be convenient to exercise the jurisdiction here. At present, not having had the advantage of the arguments—which I extremely regret—I do not see what possible inconvenience there could be. I did see an inconvenience in the case of *Kinahan* v. *Kinahan* (1) in keeping the action here when the trade-mark question might possibly be raised in *Ireland*, but here it is the trade-mark question only; and I have the Comptroller here. I have, if necessary, the power of sending to the office and getting all the assistance which the Comptroller can give me, and I have, if need be—it does not seem to be so here—the advantage of the law officers of the Crown, who are conversant with these matters, as well as their junior counsel; and I think that, when a question touching a trade-mark is to be raised, it cannot be raised anywhere more conveniently than here, unless there are other circumstances, besides the mere question of the propriety of the trade-mark, which make it convenient not to raise it here. So that on that ground also I have no hesitation in proceeding.

[His Lordship then dealt with the merits of the case, and held upon the evidence, that the trade-mark "*Desiccated Soup*" was not an old mark in use before 1875, and was, moreover, merely descriptive; and he accordingly ordered it to be expunged from the register.]

The order made upon the motion was drawn up in the following terms: "Upon motion this day made unto this Court by counsel for the Applicants . . . and upon hearing counsel for the Respondent, the Comptroller-General . . . and upon reading an affidavit of *J. R. Croft*"—one of the Applicants—"filed the 9th of March, 1892," and other affidavits filed respectively on the 17th and "18th of March," "and counsel for *Frederick King & Co.* being present in Court and declining to be added as Respondents, this Court doth order" the register of trade-marks to be rectified by expunging the trade-mark therefrom: the order to

(1) 45 Ch. D. 78.

be produced to the Comptroller-General, and an office copy thereof to be delivered to him, and his taxed costs to be paid by the Applicants. The words "and counsel for *Frederick King & Co.* being present in Court and declining to be added as Respondents" were inserted by the registrar who drew up the order.

On the 1st of April, 1892, *Frederick King & Co., Limited*, moved, under a notice of motion dated the 29th of March, 1892, to set aside the above order under the following circumstances:—The original notice of motion given by "*The Pure Beef Company*" was dated the 8th of March and given for the 11th, the Comptroller-General and *Frederick King & Co.*, both being named as Respondents. The affidavit of *J. R. Croft* mentioned in the above order was filed on the 9th of March in support of that notice of motion, *Frederick King & Co.* being referred to throughout the affidavit as "Respondents." This notice of motion was served on the Comptroller, but, for the reason already stated, the name of *Frederick King & Co.* was struck out of the notice, a copy of which, so amended, was sent to the company's registered office in *Ireland* accompanied by a letter to the effect already stated. Subsequently the notice of motion was further amended by substituting the 18th of March for the 11th as the day for hearing, and on the 18th of March the motion was brought on and an order made, as above reported, to expunge the trade-mark in question. No leave of the Court had been given to amend the notice of motion either by striking out *Frederick King & Co.* as Respondents, or by altering the date, nor had the notice of motion, after having been amended, assuming that the amendments made it a new notice of motion, been taken to the Writ Department of the Central Office to be marked with the name of one of the judges in rotation, or re-marked with the name of Mr. Justice *Kekewich*, under Rules of Supreme Court, 1883, Order v., rule 9 (*c*), (*e*).

Subsequently, *Frederick King & Co.* served the original Applicants, "*The Pure Beef Company*," and the Comptroller with the present notice of motion, dated the 29th of March, to have "the notices of motion given respectively for the 11th and 18th of March," the alleged service thereof, and the order of the 18th of

C. A. 1892 — *In re* King & Co.'s Trade-mark.

March, set aside on the ground that *Frederick King & Co.* were domiciled and had their registered office in *Ireland* and that the matter ought to be tried there, and for the further reasons following: That the notice of motion was bad for want of proper parties; that the evidence on which the order of the 18th of March was made was not regularly filed on the said notice of motion, and no order to read it was given or leave obtained for that purpose; that the notice of motion for the 11th of March was abandoned, or, if not abandoned, was amended without leave of the Court; that the notice of motion for the 18th of March was irregularly given and was not issued in accordance with Order v., rule 9 (*c*), of the Rules of the Supreme Court; that the said order of the 18th of March was made in a matter to which *Frederick King & Co.* were not parties; and that no leave to serve that company had been given. It appeared that the affidavit filed the "18th of March," entered in the order of that date as read, was not filed until after the motion had been disposed of, but the fact of its not having been filed was not mentioned to the Court, and no undertaking, therefore, to file it was given.

Hopkinson, Q.C., and *W. N. Lawson*, for *Frederick King & Co., Limited*:—

The question is whether the English Courts have the right, or, if they have the right, whether they ought in their discretion to affect by their orders an Irish limited company having their registered office in *Ireland*.

[Kekewich, J.:—You will find it extremely difficult to dislodge the order on the ground of discretion.]

Then there are two main questions to be considered, first, whether, in the absence of the owner of a trade-mark, it is right for the Court to make an order expunging his trade-mark; and secondly, whether, when the owner of a trade-mark in question is a British subject resident in *Ireland*, and there is a Court in *Ireland* competent to deal with the matter, the English Courts have any jurisdiction to interfere. With regard to the first point, it cannot be right, on such an application as this, to take away a trade-mark from the person who owns it unless he is a

party to the application; and the Court should certainly not do so where the party is a Scotchman or Irishman, and is, by the *Patents, Designs, and Trade Marks Act*, 1883, expressly made amenable in such matters to the Courts of his own country. That registration confers ownership or right of property in a trade-mark is clear from sects. 76 and 77.

The application on which the order was made was in reality an *ex parte* application. The Comptroller need not have been made a Respondent at all. There is nothing in the Act requiring him to be made a party to an application to expunge under sect. 90; and there are several reported cases, of which *In re Harrison, McGregor & Co.'s Trade-marks* (1) is an example, in which the only parties to the application are the person attacking and the person attacked. The section merely says that the Comptroller shall have notice of the "rectification"—that is, of the order rectifying the register. Under rule 49 of the *Trade Marks Rules*, 1890, the new practice has sprung up of giving him notice of any application under sect. 90; but that does not imply that he is to be a respondent.

Then, as to the second point, that of jurisdiction, the party entitled to the trade-mark in question is domiciled in *Ireland*, and, therefore, under the Act, the proper tribunal to try the question is an Irish tribunal: *Watkins* v. *Scottish Imperial Insurance Company* (2); *Wood* v. *Anderston Foundry Company* (3). The question of jurisdiction arose in *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer* (4); but it became unnecessary to decide it because the foreign company consented to appear and submit to the jurisdiction. The jurisdictions of the Scotch and Irish Courts over trade-marks are jealously preserved by the Act: sects. 111, 117.

Moreover, the proceedings are open to several questions on the ground of irregularity. First, the notice of motion upon which the order was made was not served upon us at all, and in fact could not be so served: *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer.* Then, the original notice of motion was amended without leave: in its amended form—the

(1) 42 Ch. D. 691.
(2) 23 Q. B. D. 285.
(3) 36 W. R. 918.
(4) [1891] 3 Ch. 451.

C. A. 1892 *In re* KING & Co.'s TRADE-MARK.

form in which it was sent to us—it was a new notice of motion, which ought to have been taken to the Writ Department of the Central Office to be marked with the name of the Judge in the usual way, under Rules of Supreme Court, 1883, Order v., rule 9 (*c*); but this was not done; and it was upon that irregular document that the order was obtained. The Applicants are in this dilemma: if it is said that the order was made on the original notice of motion for the 11th of March, that motion has been abandoned; if, on the other hand, the order was made on the new notice of motion for the 18th, that notice of motion has not been properly allocated to a judge in compliance with the general order. The order itself is incorrectly drawn up. The statement "and counsel for *Frederick King & Co.* being present in Court and declining to be added as Respondents" is incorrect, and we ask that it may be struck out.

[KEKEWICH, J.:—I confess I never before saw a statement of that sort in an order.]

There is another irregularity. If this is a new notice of motion upon which the order was made—as apparently it is—the order enters as "read" an affidavit sworn and filed on the 9th of March, which speaks throughout of *Frederick King & Co.* as "Respondents." That was clearly, therefore, an affidavit filed upon the old notice of motion, and not on the new, for *Frederick King & Co.* were not "respondents" to the latter at all. That affidavit could not, then, be read upon the new notice of motion without special leave, which was not obtained.

Again, the order enters as "read" an affidavit filed on the "18th of March," the date of the order. In point of fact it was not filed until after the motion was heard and disposed of. The fact of its not having been filed was not mentioned to the Court.

Upon the whole we submit that, on the ground of convenience, as your Lordship held in *Kinahan* v. *Kinahan* (1), on the ground of the want of jurisdiction, and also on the ground of irregularity, the order should be set aside, and we should be afforded the opportunity of testing the case upon its merits in the Irish Courts.

(1) 45 Ch. D. 78.

Warmington, Q.C., and *Swinfen Eady*, for the *Pure Beef Company*, and

Ingle Joyce, for the Comptroller, were not called upon.

KEKEWICH, J.:—

What may be the limits of the jurisdiction of the Irish Courts it is unnecessary, and therefore unimportant, now to decide. I am satisfied that, whatever may be the jurisdiction vested in them, there is, under the *Patents, Designs and Trade Marks Act*, 1883, jurisdiction vested in this Court to make such an order as I made on the 18th of March on proper cause shewn.

It has been argued that, in this particular case, the Court ought to exercise its discretion by declining to exercise its jurisdiction, leaving the parties to apply to the Irish Courts. That point was considered by me when the original motion was made, and the conclusion I arrived at was that the order might properly be made here. I decline to review my discretion.

Then it is urged that no order should be made on an *ex parte* application of this kind against the registered proprietor of the trade-mark sought to be expunged. In that I entirely concur. The Court ought to be reluctant, and would be reluctant, to make an order in the absence of the party who would be directly affected by it; but if it is impossible to serve him—if, for instance, he is keeping out of the way—and there are no means of serving him or obtaining an effective substituted service, the Court cannot and must not hesitate to act merely because the party may not be brought before it through failure of all proper endeavours to serve him. In this present case I certainly felt most reluctant, especially having regard to the points which were mentioned, to make the order in the absence of Messrs. *King & Co.* and I did my best to provoke them to appear, and should have assented to any reasonable adjournment of the motion for the purpose of giving them an opportunity of reconsidering their position. Even then I should not have made the order but that I was satisfied that they had had every opportunity of considering the motion, and that, although they were not strictly before the Court, and would not in the exercise of their discretion give me the assistance I

C. A. 1892 *In re* KING & Co.'s TRADE-MARK. Kekewich, J.

desired, still they knew all about the motion, and, therefore, though making the order technically *ex parte*, I was not making it without full notice to them. Though the jurisdiction to make an order *ex parte* is vested in the Court, such an order ought to be made with hesitation and reluctance. In the present case it was made with hesitation and reluctance, and then only for the reasons I have mentioned.

So far as to what may be termed the merits of the case. But the present Applicants rely on technicality, and their main technical objection is this, that there was no notice of motion properly before me. If that was so, the order was improperly made. Where, as here, a matter is commenced in the Chancery Division by notice of motion, rule 9 (*c*) of Order v. applies to it the same practice which is applied to writs of summons, originating summonses, and petitions. It would have been entirely wrong for the moving parties here to have given a notice of motion, or to have moved here either on notice or *ex parte*, without first submitting themselves to the chance of the rota and getting their matter allocated to a particular Judge. They did so in the first instance; but after allocation they found it desirable to change the date on which they intended to move from the 11th of March to the 18th. They had also inadvertently, through misapprehension as to the proper course to be pursued, originally added *Frederick King & Co.* as Respondents to the notice of motion. They then altered the notice of motion by striking out the company's name; they also altered it, as I have already stated, by changing the 11th of March into the 18th of March. The only person who was served—the Comptroller—did not object to this. The naming of the respondent to the notice of motion, though convenient and in some cases essential, is not, in my opinion, essential in such a case as this. I cannot see that by striking out the name of *Frederick King & Co.* the notice of motion was altered in an essential particular. It might have been served upon them without their being named, or service might have been omitted notwithstanding that they were named. So much for that one point. As regards the alteration of date, the date is, no doubt, an important part of a notice of motion, and sometimes much

may turn upon it; but what is now argued is that such an alteration in a notice of motion makes it a new notice of motion. Now the rule is that, where the commencement of proceedings is by notice of motion, such notice of motion shall be brought to the Writ Department and submitted to the rota; and it is said that, because the 11th was altered to the 18th, therefore the Applicants ought to have again submitted themselves to the rota or obtained a certificate, so that the new notice of motion might still be allocated to me. I hold that the alteration of a notice of motion, not pointing to new relief of any kind, but simply in a matter of date or other detail, is not a new commencement by notice of motion, and that therefore the Applicants were quite justified in proceeding on the old notice and on the old allocation to myself.

That also disposes of another technical objection, that there is entered in the order as read an affidavit which was filed before this new or amended notice of motion was given. The suggestion is that this affidavit, having been filed before the second or amended notice, could not be read on the hearing of that motion without leave, and that no such leave was granted. The Comptroller, who was the only person appearing to the motion, did not object. It is difficult to see how persons who were not parties, and as against whom the order was made *ex parte*, could afterwards take such an objection; but, having been taken, it seems to me to fail on the grounds already mentioned.

There is still one further technicality, and that is that there was an affidavit entered as read in this order which had not been filed when the motion was heard. It was filed afterwards on the same day. It is usual, no doubt, for counsel to mention such a matter and to undertake to file the affidavit; but it is also quite usual for the Registrar to allow such an affidavit to pass as mentioned in the order when it does not interfere with the date of the order, which it did not in this case; and the Comptroller having assented to the order being passed with the mention of the affidavit, I think that technical objection also fails. I do not know that I have dealt with all the numerous objections raised on the face of the notice of motion now before me, but I have dealt with all those which were seriously argued; and I

C. A. 1892 *In re* KING & Co.'s TRADE-MARK.

think that, as to the others which have not been specifically mentioned, the same result follows. The motion must be refused with costs.

Hopkinson, Q.C., asked his Lordship to strike out of the order the words "and counsel for *Frederick King & Co.* being present in Court and declining to be added as Respondents"; but

HIS LORDSHIP refused to do so.

G. I. F. C.

C. A.

Frederick King & Co. appealed from the order of the 1st of April, and also from the previous order of the 18th of March, 1892. The appeal was heard on the 24th of May, 1892.

Hopkinson, Q.C., and *W. N. Lawson* (*Asquith*, Q.C., with them), for the Appellants, referred to *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer* (1), *Watkins* v. *Scottish Imperial Insurance Company* (2), *Re Bullen-Smith* (3), *In re Harrison, McGregor & Co.'s Trade-marks* (4), *In re Busfield* (5), and the *Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 Vict. c. 57), ss. 62, 90, 107–111, 117.

Warmington, Q.C., and *Swinfen Eady*, for the Respondent, were not called on.

LINDLEY, L.J.:—

This appeal raises several points of considerable importance; but with some of them I do not propose to deal. I shall deal only with the question whether what has been done in the Court below is wrong and ought to be set aside. Now, it is necessary to observe, in dealing with the Act of 1883, that it is one Act of Parliament applicable to three things—patents, designs, and trade-marks. It is applicable to the whole of the United Kingdom, *England*, *Scotland*, *Ireland*, and the *Isle of Man*; and its general provisions are framed in language to

(1) [1891] 3 Ch. 451.
(2) 23 Q. B. D. 285.
(3) 57 L. T. (N.S.) 924.
(4) 42 Ch. D. 691.
(5) 32 Ch. D. 123.

meet the three subject-matters with which it deals, and the three countries with which it deals. I attach some importance to that general view with reference to the argument of Mr. *Hopkinson* as to the concurrent jurisdiction given to the Courts of *Ireland* and *England*. I am not going to decide to-day whether they have any concurrent jurisdiction or not. That the Courts in both countries have some jurisdiction is obvious; but whether they have such concurrent jurisdiction as is contended for is, to my mind, by no means clear. It is quite sufficient to shew that the High Court in this country has jurisdiction over this particular subject-matter, and that the mode in which that jurisdiction has been exercised is not wrong.

The present Appellants are an Irish company—that is to say, a company formed and registered in *Ireland* under the *Companies Act* of 1862. In 1889 they applied for registration of their trade-mark. Their trade-mark was registered, and the entry in the book contains, amongst other things, in accordance with the practice, the two addresses, one an Irish address, the other an address in *London*—namely, *Camomile Street*—where this company had an office or agency. The form of applying for registration will be found in Form F in Appendix B of *Sebastian* on Trade Marks (1), and the only importance of it is that there is a direction in the margin that it is to contain the full name and address of the applicant. That, of course, is in order to give the Comptroller information as to where the applicant is to be found. The application is addressed to the Comptroller: "You are hereby requested to register the accompanying trade-mark," and so on; and then in the margin there is this note: "Here insert legibly the full name, address, and description of the individual firm or company. Add trading style (if any)." There is nothing that I can discover either in the form, or in the directions accompanying the form, or in the rules, or in the Act of Parliament, to the effect that the applicant is to give or leave any address for service, unless he is a foreigner resident out of the jurisdiction, in which case there is a legislative enactment to the effect that he is to do so. That will be found in the Act of 1888 (51 & 52 Vict. c. 50), s. 8, sub-s. 2,

(1) 3rd Ed. p. 467.

C. A. 1892 *In re* King & Co.'s Trade-mark. Lindley, L.J.

which says, "Where an applicant for the registration of a trade-mark otherwise than under an international convention is out of the *United Kingdom* at the time of making the application he shall give the Comptroller an address for service in the *United Kingdom*, and if he fails to do so the application shall not be proceeded with until the address has been given." That is the only regulation that I can find anywhere about what are called addresses for service. It may be that, as regards foreigners within the *United Kingdom*, neither *Ireland* nor *Scotland* nor the *Isle of Man* are to be considered as out of the jurisdiction. It may be that for the purposes of this Act you do not want an address for service because you can serve a notice anywhere within the *United Kingdom*. At all events, it looks as if that were the meaning of the statute.

Now what was done in the present case was this. Some gentlemen who felt themselves aggrieved by the registration by this Irish company of their trade-mark, gave notice that on the 8th of March, 1892, an application would be made to the Court to expunge the mark from the register. That notice was given under sect. 90 of the Act of 1883. It was addressed to the present Appellants and to the Comptroller, and a copy of it was left for the Appellants at their *London* place of business in *Camomile Street*. At the same time a letter was sent to the company's principal place in *Ireland* by post, telling them what had been done. Pausing there for a moment, I cannot myself doubt that that proceeding might have been persevered in. I see nothing wrong in it at all. I will give my reasons presently. But owing to a doubt which arose by reason of the fact that the company were named as Respondents to that notice of motion, and a doubt as to whether they could be technically served with the notice of motion in *Ireland*, the Applicants sent another notice for the 18th of March, addressed to the Comptroller, striking out the present Respondents, and giving the Respondents notice of what was done, and asking them to treat their names as struck out, and telling them that the motion would come on on that day.

Now we have to consider the propriety or impropriety of what was done. The Act of Parliament says nothing whatever about

the method of procedure to rectify the register, except what I will read presently. The rules do not prescribe how the applications are to be made. We are left entirely to the light of nature. What is the light of nature? I mean English nature and English notions of justice, and of what is right. So far as I know, there is no magic in a notice of motion. What you want is to give your opponent notice of what you are going to do and what you want, and to give him an opportunity of shewing cause why your application should not be entertained. That is all that is required in substance, and, in substance, these gentlemen have had notice enough, and more than enough.

Sect. 90 of the Act of 1883, under which this application is made, runs thus:—Sub-sect. 1: "The Court may on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making expunging or varying the entry, as the Court thinks fit; or the Court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the Court thinks fit." Sub-sect. 2: "The Court may in any proceeding under this section decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved." Sub-sect. 3: "Any order of the Court rectifying a register shall direct that due notice of the rectification be given to the Comptroller." Now, the mere enactment that the Court may do this necessarily implies to the minds of Englishmen that the person who is to be affected must be brought before the Court somehow or other. The Court is not to do it merely because it is asked to do it without notice being given to the person who is to be affected; but nothing is said about the particular method of giving notice to him. The Court referred to there is thus defined in sect. 117: "'The Court' means (subject to the provisions for *Scotland*, *Ireland*, and the *Isle of Man*), Her Majesty's High Court of Justice in *England*." Therefore, "the Court" is the High Court; and then by rule 42 of the Rules under the

C. A. 1892 *In re* KING & Co.'s TRADE-MARK. Lindley, L.J.

Trade Marks Registration Act, 1875, these applications were assigned to the Chancery Division, and that is still the practice. Now, in order to get any application entertained by a Judge in the Chancery Division, you must get it assigned to a Judge, or marked with the name of a Judge, and you can only do that by going to the proper officer who has charge of the rota, and who will put on the notice of motion or writ, whichever it may be, the name of the Judge who is to attend to the matter. Therefore, for that purpose it is necessary to mark this notice of motion or application with the name of a particular Judge. This was so marked. But does it follow, because that is necessary in order that the case may come before the Court, that you are to apply to this application all those technical rules that apply to writs or notices of motion, the whole procedure being left in the dark? It appears to me that it is unnecessary to say anything of the sort or to go to that length. All that you have to do is to take care that your opponent has the opportunity of being present and to tell him that you are going to apply to the Court for an order—an order not on him, but on the Comptroller—to rectify the register and to expunge his trade-mark. That is all that appears to me essential.

It is in vain to say that the Court has not jurisdiction to make such an order. The thing to be rectified is, I do not say an English register, but a register for the whole of the *United Kingdom*; and the Court which has jurisdiction over that register is, among others, at all events, the High Court of Justice. Then, it is said that, by reason of sect. 111, which I will refer to presently, the Court has no jurisdiction, and that the moment you have got an Irishman or Scotchman with a registered trade-mark, all applications affecting his trade-mark must go to *Ireland* or *Scotland*. I fail to see that there is anything whatever in the language of the Act of Parliament which requires anything of the sort; and, as it appears to me, I confess it would be an extremely inconvenient construction or interpretation to put upon the Act. The sections of the Act which relate to *Scotland* and *Ireland* are sections 107 to 112. As I said before, these are general provisions relating to patents, designs, and trade-marks.

The 110th section says: "All parties shall, notwithstanding

anything in this Act, have in *Ireland* their remedies under or in respect of a patent as if the same had been granted to extend to *Ireland* only." Then follows, in sect. 111, a general saving of the jurisdiction of the Irish and Scotch Courts: "The provisions of this Act conferring a special jurisdiction on the Court as defined by this Act"—that is the High Court of Justice, by sect. 117—"shall not, except so far as the jurisdiction extends, affect the jurisdiction of any Court in *Scotland* or *Ireland* in any proceedings relating to patents or to designs or to trade-marks; and with reference to any such proceedings in *Scotland*, the term 'the Court' shall mean any Lord Ordinary," and so on; "and with reference to any such proceedings in *Ireland*, the terms 'the Court' and the 'Court of Appeal' respectively mean the High Court of Justice in *Ireland* and Her Majesty's Court of Appeal in *Ireland*." Then it says: "If any rectification of a register under this Act is required in pursuance of any proceeding in a Court in *Scotland* or *Ireland*, a copy of the decree or other authority for the rectification shall be served on the Comptroller and he shall rectify the register accordingly."

We have been pressed by Mr. *Hopkinson* to hold that that section which preserves to the Irish and Scotch Courts such jurisdiction as they had before gives the Irish and Scotch Courts exclusive jurisdiction—at least in this case, that is to say, in a case where a Scotchman or an Irishman has a registered trade-mark. I confess I cannot so read it. There is nothing in this section—which is a preserving section, and not an enabling section—which goes anything like that length, and yet that is, behind all this form and all this technicality, the real struggle. The trade-mark here belonging to an Irish company, the Irish company say, "If you want to touch our trade-mark you must come to *Dublin* or *Belfast* to do it, and you cannot do it in *London*:" that is the struggle. It appears to me that that contention is, in the face of the sections to which I have alluded, quite untenable.

I purposely forbear discussing the wider question as to the extent of the concurrent jurisdiction of the Irish Courts; it is unnecessary to decide whether an Irishman can attack an Englishman who has a trade-mark by suing him in *Ireland*.

C. A. 1892 *In re* KING & Co.'s TRADE-MARK. Lindley, L.J.

Now, to go back. The jurisdiction of the Court is, to my mind, incontestable. The procedure is nowhere fixed. Any procedure which comes up to an Englishman's standard of justice is enough to satisfy this Act. What is required by our notions of justice is, that no man shall have his case disposed of, or be aggrieved or interfered with, without ample notice to him, and an ample opportunity of shewing cause against it. Here, the Respondents, the present Appellants, have had that notice, not once, but twice or three times, and they have availed themselves of it. They were in Court, though they would not appear. They would not consent to be made Respondents, because they were afraid that if they had been formally made Respondents they would prejudice their contention that this application was made in the wrong Court and ought to be heard in *Dublin*; but still there they were, and so far as technicalities are concerned it appears to me that, if you go down to the root of the argument there is nothing in it except a false analogy based on the supposition that because the notice of motion is marked by an English Judge, the parties interested must be technically named at the foot of it as respondents, and you must get leave to serve them if they are to be affected by it. It appears to me that all that they want for the purposes of this Act is notice, and that they have had.

The point came before Mr. Justice *Stirling*, not with reference to an Irishman or Scotchman, but with reference to a foreigner where the notice of motion had been served without leave on a foreigner; but Mr. Justice *Stirling* thought that was wrong, and he said, "That will not do; you had better amend your notice of motion, strike out the Respondent, make the Comptroller the only Respondent, serve it on him, and give notice to the other parties by a letter." That is a strong intimation that that which has been done in this case, if it was really necessary, is amply sufficient. Whether it was necessary or not, I take leave to doubt. The appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. It is admitted in this case that the Irish corporation have had notice of the proceedings; but it

has been urged, with great ingenuity, before us, and it is true, that they have had no service of process upon them; and it is also true that such notice as they have had has been given to them, either in Ireland, where they are domiciled, or else at an address in England, which is the address given in their own application for registration, but that such notice was only notice of the intended application to the Court, and they were not made Respondents in any formal sense by the notice. Is that any objection to hearing the case and deciding it in their presence? They are upon the register, and they say that their rights will be affected by the removal from the register of their names. That is true. That they are parties who ought to be present is certain. The only question here is, whether the absence of service of the process of the Court is fatal to the jurisdiction of the Court to deal with the case, provided it has them before it. If service of the process of the Court is necessary for the jurisdiction of the Court, the Court cannot, except so far as it is authorized by statute, order service abroad. The effect of a statute which gives it that power does not affect, of course, the laws of other countries or the questions of international law which may be raised; but, as far as the Courts of this country are concerned, the statutes of the realm are supreme; and if the statute says that the Court shall have jurisdiction over a foreigner if service is effected in a particular way abroad, then the Courts of this country will give effect to that statute. In confirmation of that view, it may be said, there are many classes of cases in which the principle has been acted on, that if the statute, under which the proceedings in Court are brought, does not make special provision for the service of the initial process which is to found the jurisdiction of the Court abroad, you cannot serve that initial process abroad and so found the jurisdiction of the Court. In the same way, if one could conceive a class of cases in which notice to the individual was necessary to found the jurisdiction of the Court, I dare say it might well be said that a private person could not, by serving such notice abroad, create the jurisdiction at home. But there is a totally different class of cases from that, namely, where the Court at home has jurisdiction over the person or the thing; and if the Court has

C. A. 1892 *In re* KING & Co.'s TRADE-MARK. Bowen, L.J.

jurisdiction over the person or the thing, then the question whether sufficient notice has been given to anybody who is interested is a matter of municipal procedure—municipal procedure to be regulated by statute, or by Rules of Court, where the Court is empowered to make rules; but if there is no statute and no Rules of Court, a procedure which is to be judged of by the light of natural justice. In the last-mentioned case the question of the validity of the notice is a question of procedure. It is not a question of jurisdiction. It seems to me that those lines that I have just intimated are really the lines which were in the mind of Lord Justice *Cotton*, though he does not lay them down exactly in the same way, in the case of *In re Busfield* (1). In an early case before Lord *Eldon*—*Stevenson* v. *Anderson* (2)—it was held that service of notice of an interpleader might be made on a foreigner abroad; and although I am aware that his view has been somewhat questioned, there have been two concurrent lines of authority—authorities in which notices have been allowed to be served abroad, and cases in which notices have not been allowed to be served abroad, or in which the service of the notice abroad has been held to be of no avail in this country. Those cases were all reviewed in *In re Busfield*, and Lord Justice *Cotton* points out during the argument the distinction between a case where the object of the service abroad is merely to give notice of the proceedings with regard to which the Court has jurisdiction in this country, and a case where the object of the service abroad is to create jurisdiction at home. He distinguishes the authorities according as they fall on one side or other of the line. Although that was assumed, Lord Justice *Cotton* does not, I think, intimate an absolute approval of the view that notice of an interpleader will avail if it is effectuated abroad, and that has been always a point on which the decisions have been, perhaps, not quite consistent.

Now, in this case, on which side of the line does the matter fall? This is, I will not say an English register, but it is a register formed for public purposes in the *United Kingdom*. It is to be available to all the subjects of Her Majesty. It is perfectly true that others besides the subjects of Her Majesty

(1) 32 Ch. D. 123. (2) 2 V. & B. 407.

can take advantage of the register; but the object of the register is to be a benefit to trade in *England*. The Courts in *Ireland* may or may not have concurrent jurisdiction in the matter. It is a point which it is not necessary for us to decide. I will assume that they have. The register is a register for the *United Kingdom*. It is remarkable that in the provisions as to putting a trade-mark upon this register and expunging the entries, there are only very vague indications as to any necessity for service of anything. In the form of application which is to be adopted, which is the final result of various rules under sect. 62, sub-sect. 2, of the old Act, an address is to be given by the applicant; and it is provided in sect. 8 of the later statute of 1888, that where an applicant is a foreigner, he is to give an address for service in the *United Kingdom*. There is no provision as to the procedure for expunging names from the register. The language of sect. 90 of the Act, which is the section that deals with it, is most general: "The Court may on the application of any person aggrieved . . . make such order for making expunging or varying the entry, as the Court thinks fit; or the Court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the Court thinks fit."

Now, is it conceivable, with regard to a procedure of that kind, that after a trade-mark has been registered by a person or by a firm, and the person or the firm repairs, as my Brother *Kay* picturesquely said during the course of the argument, to an Irish glen or a Scotch mountain, and leaves nothing behind except the memory of himself in this country, the whole of the English trade is to be obliged to hunt him down in *Scotland* or *Ireland*, before it can get the register cured which is paralyzing their business? There may be many cases where it is convenient that the Irish or Scotch Court should deal with the application—assuming for the moment that the statute goes so far as to give the Irish or Scotch Courts concurrent jurisdiction—but that the English Court is the Court which *primâ facie* would be expected to be most cognizant of such subject-matter seems to me almost impossible to deny.

Now, with regard to such a register, can it be said that notice

C. A. 1892 *In re* KING & Co.'s TRADE-MARK. Bowen, L.J.

to the person who is interested in the entry, who is either himself the applicant or succeeds to the applicant's right, is essential to found the jurisdiction of the Court, so that if that person disappears into space the hands of the Court are for ever tied? It is impossible to suggest it with regard to a public English register. I arrive, therefore, without the faintest hesitation, at the view that this is an instance of the branch of cases where the Court has jurisdiction over the person, over the thing, over the subject-matter; and, though I agree that notice to the person interested is essential to the justice of the proceeding, it does not give the jurisdiction. It is a matter that must be regulated by municipal procedure, there being no statute of the realm. If the Legislature had chosen, it might say that such a notice shall be in this way or that way, or it might dispense with notice altogether, or it might provide that notice by advertisement in the newspapers should be sufficient. If the municipal law has made no such regulation the Courts will deal with the matter, in the absence of any provisions in the statute, by the light of natural justice. Applying that light, nobody can doubt that the person who is interested in the entry in the register should have the fullest opportunity of being heard, and, if he wishes to be heard, should be heard before the Court. He must, therefore, have full notice. But there is no regulation as to what t's are to be crossed or what i's are to be dotted in the notice to be given. It must be full and sufficient to protect his rights in every respect, and nobody need fear that an English Court would not insist on the notice being as ample and as wide as the protection of individual rights and individual property could demand. But here it has been done in the fullest sense. It is said, indeed, that the notice which was given did not intimate that the company were to be Respondents. What the exact effect of calling them Respondents or not may be as to costs I do not know; but if a notice is given to a person who is interested in property that an application is to be made to the Court to deal with his property, and if that person appears before the Court and gets the application dismissed, I cannot myself doubt that the Court has inherent jurisdiction to give him costs. In this case all has been done which was in the least necessary

for the protection of the rights of the parties. Notice has been given both in *England* and in *Ireland*, and I think, therefore, justice has been completely and substantially satisfied, and that this application and this appeal ought to be dismissed with costs.

Kay, L.J.:—

I will add a few words, not because I in the least disagree with anything that has been said by the Lords Justices, but because I wish to bring out a little more prominently one or two of the circumstances of this case.

The order appealed against recites this: "Counsel for *Frederick King & Co.*" (who are the present Appellants) "being present in Court and declining to be added as Respondents." The section under which that order was made is the 90th section which has been referred to. The Court may, on the application of any person aggrieved by an entry in the register, make such order for "expunging or varying the entry as the Court thinks fit, or the Court may refuse the application." There is not in any part of the statute a provision as to the mode in which that application is to be made. It is not said it is to be by writ or by summons or by notice of motion, nor is there any indication how it is to be made, but it is to be an application to the Court; and the only indications I can find in either the statute or the rules are these, that in rule 49 of the Trade Marks Rules of 1890, it is provided that "four clear days' notice of every application to the Court under sect. 90 of the said Acts for rectification of the register, shall be given to the Comptroller." Again, it is rather important to observe, that there is not a word there about service, but it is only that four days' notice is to be given to the Comptroller. Then there are the indications referred to by Lord Justice *Lindley* in sect. 8 of the Act of 1888, that on any application under sect. 62 of the Act of 1883, which is the section which empowers people to apply to have a trade-mark put upon the register, where the applicant is out of the *United Kingdom*, he must give an address for service in the *United Kingdom*. And again, in sect. 13 of the Act of 1888, where the application is under sect. 69 of the Act of 1883, which is the section which deals with leave to oppose an application, and the

C. A. 1892 *In re* KING & Co.'s TRADE-MARK. Kay, L.J.

person who wishes to oppose is out of the *United Kingdom*, he shall give the Comptroller "an address for service in the *United Kingdom*."

Now, those are the only places, so far as I can find, and so far as counsel can point out in any of these Acts, or in the rules made under them, where the word "service" is used at all. But I can conceive that counsel may put their case in this way: Sect. 90 says that you may make an application to the Court; it does not say how, but it must be intended that you should approach the High Court by one of those means by which the High Court is usually approached. You must proceed therefore either by writ or by summons, or by notice of motion. In this case they have chosen to proceed by notice of motion. Then the usual course of the Court certainly is that the notice of motion should be addressed to some one. It is a notice to some one that the Court is going to be moved, and the person to whom the notice is addressed, according to the ordinary course of the Court, must be served with that notice, and then it comes within the general orders which prescribe what kind of service must be made, that it must be two days before the motion comes on, and so on. Now, it may be said the Court must be approached by one or other of those modes, and directly the applicant has chosen which of those modes he will adopt, if the Court allow him to adopt that mode, then he must proceed in that mode, according to the usual practice of the Court. I quite agree that he must do so; but I do not agree that it is a matter which goes necessarily to jurisdiction. The jurisdiction is given by sect. 90, and sect. 90 does not prescribe any mode of approaching the Court whatever.

Now, what has been done in this case is this. First of all, a notice of motion was given addressed to the Comptroller, and also addressed to the company, whose trade-mark was upon the register, and then it was proper, according to the ordinary course of the Court, that that notice should be served upon both the parties to whom it was addressed. Accordingly an attempted service was made at the place of business in *England* of this company, which is domiciled in *Ireland*. Of course, there may be a question whether that would be a proper service, be-

cause, if it were an individual living in *Ireland* who had a place of business in *England*, I suppose it would not be proper merely to leave it at his place of business in *England*, if he were domiciled and living in *Ireland*; accordingly, the course taken was this. The Act does not go on to prescribe that the person whose trade-mark is upon the register shall be made respondent to any notice of motion, and the parties were, I think, well advised when they amended their notice of motion by striking out the name of the Irish company and leaving it as a notice of motion addressed to the Comptroller only; because, after all, the order to be made upon it is an order upon the Comptroller to alter the register. Therefore, they took that course, and then they gave the most full and complete notice of the motion they were going to make, not by way of formal service, but so as to enable the Irish company to be present and to urge anything they pleased when the motion came on. Accordingly, when the motion did come on, as I have read it from the recital in the order, the company were there by counsel. They had the option given to them to be made Respondents if they pleased, but they declined. They wished to rely upon the other objection, which seems to me, I confess, to be a technical objection, that they had the right to insist on their being made Respondents and being served with the notice of motion, or that the application should be made against them in *Ireland*, and not in *England* at all. Now, I do not think it proper, and I am not going to decide now or to express any confident opinion on the question whether such an application could be made before the Courts in *Ireland*. I confess at present the inclination of my opinion is, that under sect. 111 it might possibly be made, because I read at the end of that section the direction that the Comptroller shall alter the register where an order for alteration of the register shall have been made in *Ireland*, and I presume that means an order made under the Act; but at present I desire to reserve my opinion on that question till some case occurs in which it is necessary to decide it. It is not necessary to decide it here, because, assuming that there is jurisdiction in the Courts in *Ireland*, I am quite clearly of opinion that it is not an exclusive jurisdiction. The 117th section of the Act of 1883 gives jurisdiction in plain

C. A. 1892 *In re* KING & CO.'S TRADE-MARK. Kay, L.J.

and unmistakeable words to the High Court of Justice in *England*. There is a register kept in *England*, kept no doubt for the benefit of *England*, *Scotland*, and *Ireland*; but also kept for the benefit of countries outside *Scotland* and *Ireland*, because I read from the Act of 1888 that if the application is made by somebody who is residing abroad—and I believe it has been held that that does not apply merely to English subjects residing abroad—then he may apply to have a trade-mark put upon the register in *England*, and in that case he is to give an address for service in *England*, as I read it from the Act of 1888. Therefore it does seem to me perfectly clear that, whether there is any jurisdiction in the Irish Courts or not to alter this register, there most certainly is jurisdiction in the High Court of Justice in *England*, even where the person whose trade-mark is put upon the register is a person domiciled in *Ireland*. So that I agree with the rest of the Court that this objection now raised is not an objection which goes to the jurisdiction at all. It is an objection which is an objection really on procedure. The Act has left, and I think designedly left, as free a hand as possible to the Courts which have to entertain these applications under the Act in respect of procedure; and certainly natural justice is completely satisfied when you see that the procedure has been such, as it has in this case, as to give to the appellant the amplest possible opportunity of meeting everything that could be said and urged in the case, and of resisting this application in the fullest and completest manner; and therefore no kind of injustice can be alleged by these present Appellants in the nature of the procedure which has been adopted in this case; and as I think it is a question of procedure only, and not of jurisdiction, I agree that this appeal must be dismissed with costs.

Solicitors: *Hatchett-Jones & Co.; Johnson, Son, & Ellis; Solicitor to the Board of Trade.*

M. W.

NORTH, J.
1892
May 10.

In re BARKER.
BUXTON *v.* CAMPBELL.

[1891 B. 3206.]

Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8 [*Revised Ed. Statutes, vol. xvii. p.* 253]—*Action to recover Legacy—Express Trust—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 2 [*Revised Ed. Statutes, vol. xvii. p.* 77].

A testatrix by her will bequeathed an annuity to *J.* for his life. She also bequeathed some pecuniary legacies, payable after the decease of the survivor of herself, her mother, and *J.*, one of them being to the Plaintiff. And she devised and bequeathed all her real and personal estate to trustees, upon trust for sale and conversion, and out of the proceeds to pay her debts, and funeral and testamentary expenses, and the expenses of conversion, and to invest the residue, and out of the income, in the first place, to pay the annuity to *J.*, and, in subordination to the aforesaid trust, to pay and apply during the life of the mother the residue of the income (not exceeding £800), at the discretion of the trustees, for the benefit of the mother, and after her death, if *J.* should survive her, the trustees were, out of the income, to pay the annuity given to him, so long as the same should continue payable, and, "subject to the several trusts, provisions, and directions hereinbefore contained, and to the payment of the several legacies hereby bequeathed," the testatrix directed that her trustees should stand possessed of the estate in trust for the Defendant absolutely.

The testatrix died in June, 1860. She had no real estate. In December, 1860, the mother died. *J.* died in January, 1866. Owing to the default of the solicitor of the executors and trustees of the will, who had placed in his hands a sum sufficient to pay the Plaintiff's legacy, the legacy was not paid to the Plaintiff. The Plaintiff, in 1891, issued an originating summons against the Defendant, who was the surviving trustee and executor and the residuary legatee of the testatrix, claiming administration of her estate:—

Held, that no express trust was declared of the legacies, and that, consequently, the Plaintiff's right was barred by the Act, 37 & 38 Vict. c. 57, sect. 8.

ORIGINATING SUMMONS by Sir *T. F. Buxton*, as the treasurer of the *Church Missionary Society*, against *Hugh Campbell*, the surviving trustee and executor and the residuary legatee of *Harriet Barker*, deceased, claiming on behalf of the Society, as

NORTH, J. 1892 *In re* BARKER. BUXTON *v.* CAMPBELL.

a pecuniary legatee, an order for the administration of the personal estate of the testatrix and of the trusts of her will.

By her will, dated the 17th of June, 1858, the testatrix gave an annuity of £200 to *John Oakey*, during the joint lives of himself and the mother of the testatrix; and, in case he should survive her mother, the testatrix gave him an annuity of £300 from the day of her mother's death, during the residue of his life. The testatrix bequeathed a number of pecuniary legacies (some to charities), payable after the decease of the survivor of herself, her mother, and *John Oakey*; one of them being a legacy of £500 to the *Church Missionary Society*, to be paid to the treasurer of the Society. And the testatrix directed that a sufficient part of such part of her personal estate not specifically bequeathed as she lawfully could appoint or bequeath to charitable uses should before any other payment be applied, at the time thereinbefore mentioned, in payment of such charitable legacies.

The testatrix then appointed, devised, and bequeathed all the real and personal estate which she had any right or power to dispose of by will, and which she should not otherwise dispose of by her will, or any codicil thereto, unto *John Oakey* and *Hugh Campbell*, their heirs, executors, administrators, and assigns respectively, upon trusts for sale, collection, and conversion, as therein mentioned; and with and out of the money arising from such sale and conversion, and of the ready money of which she should die possessed, to pay her debts and funeral and testamentary expenses, and the expenses of conversion, and to invest the residue of the said moneys in their or his names or name, as therein mentioned; and that they should "during the joint lives of my mother and *John Oakey*, in the first place, by and out of the annual produce of the said trust funds pay the said annuity of £200 hereinbefore bequeathed to *John Oakey* during such lives, as and when the same shall become due; and shall, in the next place, and in subordination to the aforesaid trust, pay and apply during the life of my mother the residue of the annual produce of the said trust funds, to any extent not exceeding £800 per annum, in such manner as the said trustees or trustee, having regard in the application thereof to the di-

rections hereinafter contained, shall, in their or his own absolute discretion, think most expedient for the purpose of increasing the comforts of my mother, and further providing for her suitable maintenance. And I direct that after the decease of my mother, if *John Oakey* shall survive her, my said trustees or trustee shall, out of the annual produce of the trust funds, pay the annuity of £300 hereby given to *John Oakey*, when and so long as the same shall continue payable, and subject to the several trusts, provisions, and directions hereinbefore contained, and to the payment of the several legacies hereby bequeathed, when and as the same shall become payable, I direct that my trustees or trustee shall stand possessed of all the estate hereby appointed, and devised, and bequeathed, and the funds in which the same, or any part or parts thereof, may be invested, and the annual produce thereof, in trust for *Hugh Campbell*, his executors, administrators, and assigns, for his and their own absolute use."

On the 15th of June, 1860, the testatrix died. She left no real estate. On the 9th of December, 1860, her mother died. On the 14th of January, 1866, *John Oakey* died. The personal estate of the testatrix was sufficient for the payment of the legacies bequeathed by her will.

On the 17th of June, 1863, the executors carried in to the Controller of Legacy Duties their residuary account, in which they stated that they had retained £8500 to pay outstanding legacies. They estimated the value of the residue to be £4070, and offered to pay £407 for the duty, at the rate of 10 per cent. upon £4070, "being the said residue and moneys which we are entitled and intend to retain for the use of the said *Hugh Campbell*."

On the 13th of July, 1863, the executors paid to the Inland Revenue the sum of £50 as the amount of the duty payable in respect of the legacy of £500 to the *Church Missionary Society*, payable on the death of *John Oakey*.

The legacy had never been paid to the society. The Defendant alleged that a sum sufficient to pay the legacy had been left by the executors in the hands of a solicitor formerly employed by them, for the purpose of his paying it to the society, and that, until the present claim was made on behalf of the

NORTH, J. 1892 *In re* BARKER. BUXTON *v.* CAMPBELL.

society, the Defendant believed that the legacy had been paid by the solicitor accordingly. The solicitor had absconded long ago.

Dibdin, for the Plaintiff:—

The legacy to the *Church Missionary Society* is, on the true construction of the will, given to the executors upon trust, and therefore the *Statute of Limitations* does not apply: *Judicature Act*, 1873, s. 25, sub-s. 2. There is really an express trust: *Thomson* v. *Eastwood* (1); *In re Smith* (2). It is not a mere legacy, or the Plaintiff's right would be barred by sect. 8 of 37 & 38 Vict. c. 57. Sect. 10 of that Act does not apply, because the legacy is not charged upon or payable out of land.

Cozens-Hardy, Q.C., and *Boome*, for the Defendant:—

There was no trust constituted of the legacy. The Plaintiff's claim is simply that of a pecuniary legatee for a reversionary legacy which became payable in 1866 out of the residue of the personal estate. There was no real estate. Sect. 8 of 37 & 38 Vict. c. 57, applies, and the Plaintiff's right is barred. There is a trust to pay debts, but there is no trust to pay legacies. The circumstance that the executors in their residuary account said they had "retained" the legacy can make no difference: *In re Rowe* (3). There was nothing more than assent to the legacy which prevented the executors from afterwards saying that they had not assets for its payment. There was nothing which could operate to change the character of the legacy, or to constitute the executors trustees of the residue. In order to exclude the operation of the *Statute of Limitations*, the trust must be express; an implied or constructive trust is not sufficient: *In re Davis* (4).

Dibdin, in reply:—

I do not rely on the residuary account, but on the words of the will, which I say create an express trust.

There is an express trust to invest the whole estate. The whole fund is given to the executors on trust. It is clear that

(1) 2 App. Cas. 215.
(2) 42 Ch. D. 302.
(3) 58 L. J. (Ch.) 703.
(4) [1891] 3 Ch. 119.

there would have been a trust if the testatrix had possessed real estate, and the existence of a trust cannot depend on the accident of there not being real estate.

NORTH, J.
1892
In re BARKER.
BUXTON *v.* CAMPBELL.

NORTH, J.:—

In my opinion it is clear that this legacy was not held upon an express trust. The testatrix gave all her property, real and personal, to her executors upon trust for sale and conversion. Out of the proceeds, her debts, and funeral and testamentary expenses were to be paid, and the residue was to be invested in the names of her executors. Out of the income the payment of the life interests was to be provided for. Then the testatrix directs that, "subject to the several trusts, provisions, and directions hereinbefore contained, and to the payment of the several legacies hereby bequeathed," the trustees shall hold the property in trust for the residuary legatee absolutely. There is a clearly marked distinction between that part of the property as to which a trust is declared, and that as to which no trust is declared. No trust is declared of the legacies. The estate which is in the hands of the executors is to be held by them upon certain trusts so far as trusts are declared; it is to be held subject to the payment of the legacies, as to which no trust is declared, and then it is to be held on trust for the residuary legatee. In my opinion, this is not a trust legacy within the meaning of either the statute or the authorities. *In re Davis* (1) is very much in point. I must dismiss the summons, but I dismiss it without costs. The legatees were clearly entitled to the legacy, and it has not been paid to them, and I think they were entitled to have the matter investigated.

Solicitors: *Bridges, Sawtell & Co.; Houlder & Court.*

(1) [1891] 3 Ch. 119.

W. L. C.

NORTH, J.

1892

May 19, 21, 24, 28.

In re McGRATH (INFANTS).

[1891 M. 3494.]

Infant—Guardian—Removal by Court—Jurisdiction—Religious Education—Wishes of Deceased Father—Welfare of Infant—Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27), *ss.* 2, 3, 6, 13.

The Court has jurisdiction to remove a guardian of infants appointed by their mother (after the father's death), under the power conferred on her by sect. 3 of the *Guardianship of Infants Act*, 1886, if it is satisfied that it is for the welfare of the infants to do so.

The jurisdiction of the Court in relation to infants extends to infants who are not wards of Court, and who have no property.

A journeyman tailor, who was a Roman Catholic, in 1876 married a woman who was a Roman Catholic. There were six children of the marriage, all of whom, except one who died at the age of four months, were baptized as Roman Catholics. The five children who survived were, a boy born soon after the marriage, three girls born respectively in 1877, 1879, and 1881, and a boy born in 1886. The father died in June, 1888. He was at the time of his death a Roman Catholic, though during his life he had not paid much attention to religion. He was attended by a Roman Catholic priest on his death-bed, and was buried as a Roman Catholic. He expressed no wish as to the religion in which his children should be brought up. During his lifetime the children sometimes attended a Protestant school on Sunday and attended Protestant places of worship, and he knew that they did so. He never spoke to them about religion. In 1886 the eldest boy was with the father's consent placed in an industrial home, which was conducted on the principles of the Church of *England*. This boy afterwards went into domestic service. The eldest girl was, from November, 1885, down to the time of her father's death, educated chiefly at a Roman Catholic school, but during the six months preceding her father's death she attended more or less at a Board school. The two younger girls were from November, 1885, to April, 1888, educated at a Roman Catholic school. Just before their father's death they were placed in a Roman Catholic establishment, but while there they occasionally attended a Protestant school on Sunday. After the father's death the mother was in very poor circumstances, and a benevolent lady, who was a member of the Church of *England*, rendered her regular pecuniary assistance. In November, 1889, the mother executed a deed by which, in exercise of the power conferred on her by the *Guardianship of Infants Act*, 1886, she appointed this lady to be guardian after her own death of the three girls and the younger boy. In April, 1890, the three girls were removed from the Roman Catholic school at which they had been, and were sent to a Board school. The two younger girls remained there till their mother's death on the 30th of July, 1891. The elder girl was in December, 1890, under the directions of the same lady placed in an

industrial home, which was conducted on the principles of the Church of *England*. In May, 1891, she was taken home to attend on her mother, who was then dying. Immediately after her mother's death she was taken back to the industrial home, and the younger girls were also taken there. The mother before her death became a Protestant. The younger boy went to live in the house of his mother's brother, who was a Roman Catholic, and with his uncle's children attended first a Board school, and afterwards a National school. In November, 1891, an aunt of the father, who was a Roman Catholic, acting as next friend of the four younger children, took out a summons asking that the guardian might be removed, and the next friend and a Roman Catholic lady appointed joint guardians of the four children :—

Held, that, though, if an application had been made immediately after the father's death, the Court must have directed that the children should be brought up in their father's religion, yet, having regard to all the circumstances, it would not be for the welfare of the children that the guardian should be removed, and that no direction ought to be given as to the religious education of the children.

The summons was accordingly dismissed.

SUMMONS issued on the 18th of November, 1891, under the *Guardianship of Infants Act*, 1886, and the *Custody of Children Act*, 1891, by *Margaret Macauliffe*, as next friend on behalf of four infants, asking that Mrs. *Hannah Scrimgeour*, who, after the death of the father, had been, by a deed dated the 1st of November, 1889, appointed by the mother of the infants (since deceased) their guardian, might be removed, and that a Mrs. *Bagshawe* and the next friend might be appointed guardians of the infants in the place of Mrs. *Scrimgeour* ; or, in the alternative, that Mrs. *Bagshawe* and the next friend might be appointed to act jointly with Mrs. *Scrimgeour*, upon her undertaking to bring up the infants in the religion of their deceased father.

Joseph McGrath, the father, was a Roman Catholic. The next friend and Mrs. *Bagshawe* were Roman Catholics ; Mrs. *Scrimgeour* was a member of the Church of *England*.

The next friend (also a Roman Catholic) was an aunt of the father. The summons was served on Mrs. *Scrimgeour* and on Mr. *William Dwyer*, a brother of the mother, with whom the youngest of the infants (a boy) was living. Mr. *Dwyer* was a Roman Catholic.

The father of the infants was born in 1856; he was a journeyman tailor, with no means except his earnings. He was

NORTH, J. 1892 *In re* McGRATH (INFANTS).

of a consumptive tendency. He was baptized as a Roman Catholic, and was brought up and confirmed as a Roman Catholic. In March, 1876, when he was only nineteen, he married *Mary Ann Dwyer*, who was also a Roman Catholic. She also was of a very consumptive tendency. There were six children of the marriage, who were all baptized as Roman Catholics, except one who died in 1885 at the age of four months, and was buried in unconsecrated ground. For at least a year before the father's death he was in very bad health. He was in several hospitals successively, and while there he was assisted from two funds appropriated for the benefit of indigent Roman Catholics. When he was near his death a request was made that prayer should be offered up for him by a Roman Catholic priest, and on the eve of his death his wife went for a Roman Catholic priest, who came and administered to him the last offices of the Church; and immediately after his death two nuns were brought, by whom he was laid out. He died on the 6th of June, 1888. He was buried as a Roman Catholic, and the mother and all the five children were present at the funeral. There was evidence that during the period shortly before his death he was visited by various persons who were Roman Catholics. He had given a Roman Catholic prayer-book to his sister, and had, according to the evidence, asked for and received some Roman Catholic religious books. There was evidence that during his lifetime he had been very irreligious; that latterly, at any rate, he never went to any place of worship, and that he spoke slightingly of religion, treating the religions both of the Church of *England* and of the Church of *Rome* in the same way. He never spoke to his children about religion, and he expressed no wish as to the religion in which they should be brought up. He knew that the children sometimes went to a Protestant Sunday-school and to Divine service in a Protestant chapel or a church, but it was apparently left altogether to the children to do as they pleased. The father sometimes asked where they had been, and he did not express disapproval when he was told where they had been. They attended a school which was kept by a Mrs. *Spencer*, the wife of the landlord of the house in which they lived. He and his wife allowed a room in their house to be used as a mission

chapel of some kind, and they had a school there on Sunday afternoons.

The first child of the marriage, a boy, was born a few months after the marriage. The present application did not relate to him.

In the year 1886 he was placed, with his father's consent and concurrence, in an Industrial school, which was conducted on the principles of the Church of *England*, and the boys who were at that school were taken, as the father knew, to a Church of *England* place of worship. There was evidence that the father did not make any objection to this. His aunt spoke of an interview which she had with him on his death-bed, and mentioned that he then spoke to her about his son being at this school. She asked if it was a Roman Catholic school. He told her that it was not, and spoke to her rather apologetically of the boy's being at such a school, as knowing that she would object to it. That son had since left the school, and had gone into domestic service. He made an affidavit on the summons, in which he said that he had been brought up as a Protestant, and that he wished and intended to continue in that religion.

The four children to whom the present summons related were, three girls, viz., *Mary Margaret*, born in 1877; *Elizabeth*, born in 1879; and *Catherine*, born in 1881; and a boy, *Thomas Michael*, born in 1886. *Mary Margaret*, from November, 1885, down to the time of her father's death, was educated chiefly at a Roman Catholic school, but from December, 1887 to June, 1888, she was on the books of a Board school, and was, during that six months, more or less in attendance there. That was during the period when her father was very ill, and was a good deal away from home at hospitals, and there was no evidence that he knew anything about it. This girl on Sunday evenings went occasionally to a Protestant chapel, or to Mrs. *Spencer's* school, and the father knew that she went there. As regarded the girls, *Elizabeth* and *Catherine*, the evidence was, that from the 2nd of November, 1885, to the 17th of April, 1888, they were educated at a Roman Catholic Girls' School. Just before the father's death, the mother took them to *Nazareth House*, an establishment for the education of children which was conducted by

NORTH, J. 1892 *In re* McGRATH (INFANTS).

Roman Catholics. Mr. Justice *North* thought it clear from the evidence that they were taken there at the father's wish. But, while they were there, they also occasionally went to Mrs. *Spencer's* school. The youngest child, *Thomas Michael* (who was only two years old when his father died), was at home down to the time of his father's death in June, 1888.

In June, 1889, a Mr. *Williams*, who acted as an agent for Mrs. *Scrimgeour* in dispensing charity, had his attention directed to the *McGrath* family by one of the district visitors in the neighbourhood in which they lived. They were in very poor circumstances. The mother was in very delicate health, and could do very little to maintain her children. Mrs. *Scrimgeour* was a lady possessed of large means, who devoted a good deal of her money to the assistance of poor and deserving persons, and, among other things, she kept a school for work in which she provided work for poor persons who needed assistance of that kind. Mr. *Williams* informed Mrs. *Scrimgeour* of the condition of the *McGrath* family, and the mother was at once introduced to the work school, at which work was found for her so long as she was able to do it. Towards the end of her life she was incapacitated by the state of her health from earning her livelihood at all. Before her death she became a Protestant.

On the 1st of November, 1889, she executed a deed by which, by and under the powers of the *Guardianship of Infants Act*, 1886, and any other powers enabling her in that behalf, she appointed Mrs. *Scrimgeour* to be the guardian of the four younger children, from and after her own death during the minority of the infants respectively. With respect to this appointment, Mrs. *Scrimgeour* deposed as follows: "Some time before the 1st of November, 1889, the said *Mary Ann McGrath* constantly begged me to become the guardian of the four infants on her death, and I consented, and I was appointed guardian by a deed made on the 1st of November, 1889, and signed by the said *Mary Ann McGrath*. She gave me as her reason for asking me to be guardian, that she knew I would look after them and bring them up as Protestants."

In April, 1890, Mrs. *Scrimgeour* began to provide means for the maintenance of the two younger daughters (the mother

being unable to maintain them), and she paid a weekly sum to Mr. *Dwyer* for their maintenance. At that time the three girls were all removed from the Roman Catholic school at which they had been since the father's death, and were sent to a Board school at *Latimer Road, Notting Hill.* The two younger girls were left there till their mother's death. *Mary Margaret* was left there till December, 1890, when she was removed, under Mrs. *Scrimgeour's* directions, to an Industrial Home at *Stockwell,* in which the children of poor parents were educated in such a way as to qualify them for going into service and earning their own livelihood. The boy, *Thomas Michael,* was placed with Mr. and Mrs. *Dwyer.* The elder daughter remained at *Stockwell* from December, 1890, till about May, 1891. She was then taken home to attend to her mother, who was dying, and she remained with her mother down to the time of her death on the 30th of July, 1891. It appeared that in the period between the father's death and the mother's death, the three girls attended more or less at a Sunday-school at *Notting Hill* attached to a Congregational Chapel, but the evidence on this point was not very clear.

On the 5th of August, 1891, immediately after the mother's death, the eldest girl was sent back to the *Stockwell* Home, and the two other girls were also taken to *Stockwell,* and there they had ever since remained. The boy, *Thomas Michael,* was then placed permanently with the *Dwyers,* and had been there ever since. From May 1890 to September 1891, he went with his cousins (the children of Mr. and Mrs. *Dwyer*) to a Board Infant School, and from September 1891, he, with them, attended a National school.

S. Hall, Q.C., and *P. S. Stokes,* for the summons:—

The real question is, whether the infants are to be brought up as Protestants or as Roman Catholics. The next friend, who is an aunt of the infants' father, desires that they should be brought up in his religion. We should be satisfied with an undertaking by Mrs. *Scrimgeour* that they shall be educated as Roman Catholics. It is not seriously disputed that the father lived and died a Roman Catholic, though he may not have been very attentive to his religious duties. The law is well settled,

NORTH, J. 1892 *In re* McGRATH (INFANTS).

that it is not competent to a mother, still less to a stranger like Mrs. *Scrimgeour*, who has been appointed guardian, to alter the religious status of infants after their father's death.

[*Cozens-Hardy*, Q.C., for the Respondents:—

The infants are not wards of Court, and the Court has, therefore, nothing to do with their education, they having a legal guardian. Sects. 2, 3, 4, 5 (1), of the *Guardianship of Infants Act*, 1886, do not apply to this case. Sect. 6 applies, but it does not empower the Court to give any direction as to the education of the infants. It enables the Court "on being satisfied that it

(1) By sect. 2: "On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act then from and after the passing of this Act, the mother if surviving shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother."

By sect. 3: (1.) "The mother of any infant may by deed or will appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they shall act jointly.

(2.) "The mother of any infant may by deed or will provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father of such infant, and the Court, after her death, if it be shewn to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians who shall thereupon be authorized and empowered so to act as aforesaid, or make such other order in respect of the guardianship as the Court shall think right."

Sect. 6: "In *England* and *Ireland* the High Court of Justice, in any division thereof, and in *Scotland* either division of the Court of Session, may, in their discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed."

Sect. 13: "Nothing in this Act contained shall restrict or affect the jurisdiction of the High Court of Justice in *England*, and of the High Court of Justice in *Ireland*, or of any division of the said Courts, and of the Court of Session in *Scotland*, to appoint or remove guardians, or (in the case of *Scotland*) tutors or factors *loco tutoris* or otherwise in respect of infants."

is for the welfare of the infant" to remove any guardian, either testamentary or appointed by virtue of the Act, and to appoint another guardian in place of the guardian removed; but there is no power to appoint an additional guardian. It was thought necessary to give the Court, by sect. 2, an express power to appoint a guardian to act jointly with the mother. No such power is given by sect. 6.

NORTH, J.:—I might not be able to leave Mrs. *Scrimgeour* as the guardian appointed by deed, and appoint another person to act as guardian with her; but why could I not, if I thought it desirable to do so, remove Mrs. *Scrimgeour*, and then appoint her and another person joint guardians?]

It is the settled rule of the Court that an infant must be brought up in its father's religion. This rule has not been altered by the Act of 1886: *In re Scanlan* (1). The evidence clearly establishes that the father was a Roman Catholic. The Court will not weigh minutely the moral character of the father; the only question to be considered is, what was his religion: *In re Newbery* (2); *Hawksworth* v. *Hawksworth* (3).

Cozens-Hardy, Q.C., and *Micklem*, for the Respondents:—

The Court has no jurisdiction as regards the education of an infant who is not a ward of Court. No charge is made against Mrs. *Scrimgeour*, and the Court will not remove a guardian on the mere ground of religion. The Court could not formerly have removed a testamentary guardian. The jurisdiction is purely statutory. No case can be found in which the Court has given any directions about the religious education of an infant who has a guardian and is not a ward of Court: *In re Clarke* (4); *In re Agar-Ellis* (5).

[NORTH, J.:—Sect. 6 provides that the Court is to have regard to the welfare of the infant; is its spiritual welfare to be excluded from consideration?]

The Court must have regard to the general welfare of the

(1) 40 Ch. D. 200.
(2) Law Rep. 1 Ch. 263.
(3) Law Rep. 6 Ch. 539.
(4) 21 Ch. D. 817.
(5) 24 Ch. D. 317, 328.

NORTH, J. 1892 *In re* McGRATH (INFANTS).

child, and it is not hampered by the wishes of the father. Mrs. *Scrimgeour* stands in the same position as a testamentary guardian, neither better nor worse: *In re Scanlan* (1). The power of appointing a guardian given to the Court by sect. 2 of the Act is larger than that given by sect. 6. In sect. 2 the words are, "if it shall think fit"; in sect. 6 they are, "if they shall deem it to be for the welfare of the infant." In order to remove Mrs. *Scrimgeour* the Court must be "satisfied that it is for the welfare of the infant." The Court has no view in favour of one religion or another. When the infant is not a ward of Court the religion of the father is a wholly irrelevant matter. Both *Reg.* v. *Barnardo* (2), and *Barnardo* v. *McHugh* (3), were cases of *habeas corpus*, and the decision turned not on religion, but on the legal right of the parent to the custody of the child.

[NORTH, J.:—Your argument amounts to this, that what the Court could do, if the mother herself were guardian, it cannot do when the mother has appointed a guardian.]

Because the Act has not provided for that case. A father may forfeit or abandon his right to prescribe the religious education of his child, and if he does so the Court will consider only the happiness and benefit of the child: *Andrews* v. *Salt* (4); *In re Clarke* (5). The father's wishes will not be attended to if they cannot be carried into effect without sacrificing the well-being of the child: *Stourton* v. *Stourton* (6); *Hill* v. *Hill* (7); *In re Nevin* (8). In *In re Scanlan* (9), if the father of the infants had died early in 1886, Mr. Justice *Stirling* would not have attended to any wish or direction of his that the children should be brought up as Protestants. In the present case the Court cannot disregard what has taken place since the father's death, and, under the circumstances, it ought not to regard any presumed wish of the father. The evidence as to the wishes of the father is conflicting.

If the Court requires her to do so, Mrs. *Scrimgeour* will under-

(1) 40 Ch. D. 200.
(2) 24 Q. B. D. 283.
(3) [1891] A. C. 388.
(4) Law Rep. 8 Ch. 622.
(5) 21 Ch. D. 817.
(6) 8 D. M. & G. 760, 771.
(7) 31 L. J. (Ch.) 505, 509.
(8) [1891] 2 Ch. 299, 311.
(9) 40 Ch. D. 200, 210.

take that the infants shall be brought up in the Roman Catholic religion.

S. Hall, in reply:—

In order to give the Court jurisdiction it is not necessary that the infants should have property and be wards of Court: *In re Fynn* (1); *In re Spence* (2); *Brown* v. *Collins* (3).

If necessary I should contend that the infants are by the issue of the summons made wards of Court: *De Pereda* v. *De Mancha* (4).

It would be a strange thing if the jurisdiction of the Court to appoint a joint guardian were different under sects. 2 and 6 of the Act of 1886. That Act is only an enabling Act, and does not interfere with the former jurisdiction of the Court, which is indeed expressly reserved by sect. 13. At any rate the Court has clearly power to remove Mrs. *Scrimgeour* and to appoint some one else to act with her, if she is willing to act with another person. Sect. 4 of the *Custody of Children Act*, 1891, shews that in the view of the Legislature the misconduct of a father which may disentitle him to the custody of his child is not a ground for depriving him of his legal right to prescribe the religion in which the child shall be brought up. *In re Clarke* (5); *In re Agar-Ellis* (6); *Andrews* v. *Salt* (7); *In re Newbery* (8); *Hawksworth* v. *Hawksworth* (9); were all very different cases from the present. *Austin* v. *Austin* (10) shews the regard which the Court pays to the wishes of a father. It is not necessary that the father should have given any express directions; the Court assumes that he wishes his children to be brought up in his own religion. The question is simply, whether the father was a Roman Catholic, and the evidence shews clearly that he was. *In re Scanlan* (11); *Reg.* v. *Barnardo* (12); and *Barnardo* v. *McHugh* (13) have no bearing on the present case. There has been no such delay in applying to the Court as can defeat the rights of the father. The

(1) 2 De G. & Sm. 457, 481.
(2) 2 Ph. 247, 252.
(3) 25 Ch. D. 56.
(4) 19 Ch. D. 451.
(5) 21 Ch. D. 817.
(6) 24 Ch. D. 317.
(7) Law Rep. 8 Ch. 622.
(8) Ibid. 1 Ch. 263.
(9) Ibid. 6 Ch. 539.
(10) 4 D. J. & S. 716.
(11) 40 Ch. D. 200.
(12) 24 Q. B. D. 283.
(13) [1891] A. C. 388.

NORTH, J. 1892 *In re* McGRATH (INFANTS).

next friend is the proper person to have the control of the infants, otherwise they will be separated from their nearest relations.

May 28. NORTH, J. (after stating the facts relating to the father and mother, and their children, down to the date of the father's death, continued) :—

I have no doubt that at the time of his death the father was a Roman Catholic, and my conclusion is that, at the time of the father's death, these children ought, beyond all question to have been brought up in the Roman Catholic religion. It is said that the father never expressed any wish on the subject. I do not think it was necessary that he should do so. What is the rule of the Court with regard to the education of children, in the absence of special circumstances rendering a departure from the rule desirable ? The practice of the Court is to bring up children in their father's religion. In *Hawksworth* v. *Hawksworth* (1) Lord Justice *James* said (2): "The rule of the Court is, that the Court, or any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child; and, unless under very special circumstances, to see that the child is brought up in the religious faith of the father, whatever that religious faith may have been." And Lord Justice *Mellish* said (3): "It certainly, to me, is very desirable that the rule of law which regulates the religion in which children of early years should be educated should be clearly laid down and enforced : and that rule unquestionably is, that unless the interest of the child interferes so as to make it the duty of the Court to make some exception, the child is to be educated in the religion of its father. Then is there really any reason why that rule should be departed from in this case? I can quite conceive that there may be a difference of opinion as to whether the rule of law is really such as it is desirable to have in the case where the mother is of a different religion from the father, and the father has died without giving any express directions as to the religion in which the child is to be brought up. I can quite conceive that many persons might

(1) Law Rep. 6 Ch. 539. (2) Law Rep. 6 Ch. 542.
(3) Law Rep. 6 Ch. 544.

think that it would be for the interest of the child in such cases that the mother should be allowed to educate the child in her own religion; but that is not the rule of law. The rule of law is, that the religion of the father is to prevail over the religion of the mother, even in such a case, and that rule of course we cannot alter." Those remarks were made with reference to the case of a child whose parents were of different religions, and they apply *à fortiori* to a case in which, as in the present, both parents were of the same religion. Again, in *In re Scanlan* (1) Mr. Justice *Stirling* said (2): "Under the *Guardianship of Infants Act*, 1886, a mother who survives the father of her children is now by law their guardian, either alone, where no guardian has been appointed by the father, or jointly with any guardian appointed by the father. As regards her powers as such guardian, they are to be those which any guardian appointed by will or otherwise had at the passing of the Act under the Act 12 *Car.* 2, c. 24. What, then, was the duty of such a guardian as regards the religious education of the children committed to his charge? The answer is to be found in the passage I have already cited from *Hawksworth* v. *Hawksworth* (3)." (I will not read it again.) "And the rule applied none the less that the guardian appointed by the father was the mother. Under the statute it seems to me upon the terms of sect. 4, that the mother is bound to observe this rule." One of the cases referred to by Mr. Justice *Stirling*, as to the duty of a mother who is appointed guardian by the father, was *In re Newbery* (4), in which the father had appointed the mother testamentary guardian, and she had become of a different religion. It appears from the authorities that exceptions have been taken when the father has what is sometimes called abdicated, or abandoned, or given up the legal right which he unquestionably has to direct the religion in which his child shall be brought up. It is clear that he has a duty to perform, and I do not see how anything which he does can put an end to that duty. It is clearly settled that, if he contracts (as is not unfrequently done in the case of a marriage between parents, one of whom is a member of the Church of *England* and the other a member of the Church of

(1) 40 Ch. D. 200.
(2) Ibid. 213.
(3) Law Rep. 6 Ch. 539.
(4) Ibid. 1 Ch. 263.

NORTH, J
1892
In re McGRATH (INFANTS).

Rome), that some of the children shall be brought up in a religion different from his own, that contract goes for nothing. It is not binding on him. It is a circumstance which may be looked at in considering what ought to be done, but it is not a contract which the father has any legal power to make. In the same way, I do not see how a father can get rid of the duty which is cast upon him by any neglect of that duty during his lifetime. But this is quite clear, that the Court must look to the interests of the infant, and, if the father has neglected his duty, and the infants have been allowed, by reason of his doing so, to be brought up in a religion different from his own, he may have ceased to have the right to perform his legal duty, by reason of the position in which the children have been placed in consequence of his not having taken the steps which he might, and morally ought to, have taken. But, as I understand the cases, the Courts have proceeded simply upon this, that it is for the welfare of the child that the state of things which has been allowed to be established should not be altered by reason of a change of view on the part of the father. Many cases bearing upon that point have been cited: such as *Hill* v. *Hill* (1); *Lyons* v. *Blenkin* (2), and *Andrews* v. *Salt* (3). The only one to which I wish to refer is *In re Clarke* (4), in which Mr. Justice *Kay* said (5): "There is no doubt about the ordinary rule of the Court," and he cited that part of the judgment of Lord Justice *James* in *Hawksworth* v. *Hawksworth* (6) which I have already read. Then he continued: "On the other hand, doubtless the Court has to consider, and to make out as far as it can, whether the father has indicated any desire as to the particular faith in which the child should be brought up, and, of course, if the Court comes to the conclusion that the father has indicated such a desire, it would be bound, as I understand the authorities, to carry out that wish of the father. Moreover, if the father, without in any direct manner indicating his own desire, has so acted with regard to his child as in fact to have chosen the faith in which he should be brought up, if he has abdicated, or, as it has been

(1) 31 L. J. (Ch.) 505.
(2) Jac. 245.
(3) Law Rep. 8 Ch. 622.
(4) 21 Ch. D. 817.
(5) Ibid. 823.
(6) Law Rep. 6 Ch. 542.

called in some cases, 'abandoned' his right to have the child brought up in his own faith, that, again, is a thing to which the Court is bound to have regard in reference to the further education of any child whom he may have left. And there is a third thing to which the Court is always bound to have great regard, especially where there is any great doubt or difficulty in deciding what the wishes of the father, if he had lived, might have been, viz., what is for the benefit of the child under the circumstances of the case."

I have said that, in my opinion, these children ought to have been brought up as Roman Catholics, and, if we were now at the date of the father's death, I should have no option but to say that they must be so brought up. But the father died in June, 1888—four years ago—and it is very important to consider what has taken place since his death. [His Lordship then stated the facts subsequent to the death of the father, including the appointment of Mrs. *Scrimgeour* as guardian. He referred to Mrs. *Scrimgeour's* affidavit on this point, and said:—

I accept her statement as perfectly accurate, so far as it goes, but I am quite satisfied that a good deal more than we know of must have taken place. I do not believe that this poor tailor's wife knew anything about statutory guardians, or the power of a mother to appoint a guardian, and I feel convinced that in this matter she was rather led than leading, and that the suggestion of the guardianship came in the first place, not from her, but probably from Mr. *Williams* or possibly from Mr. *Scrimgeour*. I cannot find any trace of her having at that time ceased to be a Roman Catholic, as she clearly had been during the whole of her husband's life. There is some evidence addressed to the later periods of her life, but I cannot find any trace of her having down to this time fallen under influences which led her to take a different view of religion from that which she had formerly taken. His Lordship continued:—]

There is nothing which explains under what circumstances she ceased to belong to the Church of *Rome*, and became a member of the Church of *England*. Although no doubt the ministers of each religion were more or less attentive to her, I think, upon the result of the evidence, that she was rather a

NORTH, J. 1892 ~~ *In re* McGRATH (INFANTS).

member of the Church of *England* than of the Church of *Rome* immediately before her death. The evidence on that point is extremely vague, but I gather from it that about the last year of her life she was more inclined to the Church of *England* than to the Church of *Rome*. There is, it is said, evidence that she objected to the two younger girls being kept at *Nazareth House*, and said that she would have them out as soon as their father was dead, but against that there is the fact that they were left there for two years after the father's death, and that she constantly visited them there, and apparently did not make any complaint of their being there. At any rate, the strong fact remains that they were left there all that time. I do not forget that, considering her small means, she was not likely to take them away from a place where they were kept for nothing in order to put them where they would be living at her expense; but still, so far as I can judge, no objection was made by her to their remaining there during that time. She had certainly not shewn the least indication of leaving the Roman Catholic religion until some time after her husband's death, and two or three witnesses speak of her saying on her deathbed that she could die happy because all her children were provided for. Such a remark seems to me to point rather to their worldly position than to any question of religion. She might well be thankful that Mrs. *Scrimgeour* had taken the care of her children which she had done, and I think her remark refers to their position in that respect. She never went to any English church herself, but that is to some extent accounted for by the state of her health.

The question is, What ought now to be done? It was argued, first, that I have no jurisdiction to make any order, having regard to the statute of 1886. That is the statute which first gave the mother certain rights as the guardian of her children, and certain powers as to the appointment of a guardian. [His Lordship referred to sects. 2, 3, 6, and 13 of the Act, and continued:—]

It seems to me perfectly clear that the Court has power to remove Mrs. *Scrimgeour* from being guardian, and to appoint another guardian in her place. But the Court cannot properly

do so, unless it is satisfied that it is for the welfare of the infants that it should be done. If I should come to the conclusion that it would not be for the welfare of the infants to remove Mrs. *Scrimgeour*, I could not do it; but, if I should come to the conclusion that it would be for their welfare, I am quite satisfied that the jurisdiction of the Court is ample.

But then it is said that I have no jurisdiction in this case, and for this reason, because the infants are not wards of Court, and have no property—that the Court cannot interfere under such circumstances. I think that proposition is wholly unsupported by either principle or authority. *In re Fynn* (1) is an instance in which the Court exercised its jurisdiction to take children who had no property of their own out of the custody of their father, upon the ground that it was not for their welfare that they should remain with him. The great question was how the discretion ought to be exercised; but that the Court had the power and the discretion was clearly established. That was not a case under *Talfourd's Act*, because the children were not in the father's custody, and the application was not by the mother; but they were at the time in the custody of the mother, and the application was made by their grandmother, as their next friend. Again, in *In re Spence* (2), the marginal note is, "The cases in which this Court interferes for the protection of infants are not confined to those in which there is property. The Court may make an order for the delivery of an infant to the party who ought to have the custody of it, on petition, as well as under the general jurisdiction upon *habeas corpus*." And Lord Chancellor *Cottenham* said (3): "I have no doubt about the jurisdiction. The cases in which this Court interferes on behalf of infants, are not confined to those in which there is property. Courts of law interfere by *habeas* for the protection of the person of anybody who is suggested to be improperly detained. This Court interferes for the protection of infants, *quâ* infants, by virtue of the prerogative which belongs to the Crown as *parens patriæ*, and the exercise of which is delegated to the Great Seal." That passage was quoted with approval by Lord *Halsbury* in the recent

(1) 2 De G. & Sm. 457. (2) 2 Ph. 247.
(3) 2 Ph. 252.

NORTH, J.
1892
In re McGRATH (INFANTS).

case of *Barnardo* v. *McHugh* (1). Again, in *Brown* v. *Collins* (2), Mr. Justice *Kay* said (3): "Undoubtedly, we use the words 'ward of Court' in such a case in rather a special sense. In one sense all British subjects who are infants are wards of Court, because they are subject to that sort of parental jurisdiction which is intrusted to the Court in this country, and which has been administered continually by the Courts of the Chancery Division. It may be exercised as it has been in many cases, such as *In re Fynn* (4) and *In re Spence* (5), whether they have property or not, although, of course, where the infant has no property it makes it extremely difficult to exercise the jurisdiction at all; but supposing a case to arise respecting the custody of the infant, it has been declared again and again, and especially in those two cases, that it is not the fact of there being property under the control of the Court of Chancery which gives the jurisdiction. The jurisdiction exists from the fact that the infant is a British subject, and the Chancery Division has always exercised that parental jurisdiction over British subjects who are infants." Then there are *In re Scanlan* (6) and *In re Nevin* (7), where the child was penniless, and the Court appointed a guardian, and gave directions as to the religion in which the child was to be brought up.

But it is said there are two cases inconsistent with this view. One of them is *In re Clarke* (8), in which Mr. Justice *Kay*, speaking of a child, one of a family of children, said (9): "It would certainly not be for the benefit of a child of such tender years (he is now only between eight and nine years of age) to take him away from the custody of his mother. The daughters, I understand, have no fortune, they are not wards of Court, and they will inevitably, so far as I can foresee, be brought up in the faith of their mother as Roman Catholics." In my opinion the learned Judge was there stating not law, but fact. He was expressing his view of what would probably be the result in that case. Nobody was likely to interfere, and that was what

(1) [1891] A. C. 395.
(2) 25 Ch. D. 56.
(3) Ibid. 60.
(4) 2 De G. & Sm. 457.
(5) 2 Ph. 247.
(6) 40 Ch. D. 200.
(7) [1891] 2 Ch. 299.
(8) 21 Ch. D. 817.
(9) 21 Ch. D. 823.

he expected the course of things would be. I do not understand that he was expressing any opinion about the law. If we look at the earlier part of his judgment that view is strengthened, for he there stated the law in a way which would otherwise be at variance with the passage which I have read. Moreover, *Brown* v. *Collins* (1) is a later decision of the same learned Judge, but I do not look upon it as in any way inconsistent with *In re Clarke* (2). I think the two cases are quite consistent. In *Brown* v. *Collins* the learned Judge was stating his view of the law; in *In re Clarke* he was only stating the course which he anticipated things would take, nobody having any interest in interfering or asking for the protection of the Court.

Then a passage in the judgment of Lord *Esher* in *In re Agar-Ellis* (3) was relied upon, and no doubt that passage, if looked at by itself, may seem to say that the Court has no jurisdiction unless the infant has property. But, if we read the whole of Lord *Esher's* judgment, I think it is clear that that was not his meaning. He was dealing with the particular case before him, and he did not intend to say anything inconsistent with the law of the Court as I have deduced it from the authorities to which I have referred. And, even if Lord *Esher* intended to express a different view of the law, it is clear from the judgments of the two Lords Justices that they were of opinion that the Court had jurisdiction, and that the only question was, whether the Court should in its discretion exercise that jurisdiction.

It was said that the issue of the summons made the infants wards of Court. That I confess I do not understand. I cannot see how the taking out of a summons, asking the Court to do what it has otherwise no jurisdiction to do, can give the Court jurisdiction to do it. Therefore, I do not act upon any view that the infants have been made wards of Court by the taking out of this summons.

The question remains, what ought I to do now, after the four years which have elapsed since the father's death. I have referred to his conduct with regard to his eldest son, because it seems to

(1) 25 Ch. D. 56. (2) 21 Ch. D. 817.
(3) 24 Ch. D. 317.

NORTH, J. 1892 *In re* McGrath (Infants).

me to throw a good deal of light upon his views in regard to this matter. My conclusion is, that the difference between the Church of *England* and the Church of *Rome* was not, in his view, of such vital importance as to prevent his doing that which he considered best for the temporal welfare of his child. I am not sure that I am speaking adequately in saying that he did not consider that difference of vital importance; he may not have thought of it at all; but, if he did think of it, it is clear that he thought the fact that the child was being placed in an industrial home, in which he would be well brought up, was an advantage outweighing the disadvantage (if any) arising from the fact that the children in that home were brought up according to the principles of the Church of *England*. Then, as I have already said, four years have elapsed since the father's death. The elder daughter is now between fifteen and sixteen. I was asked to see her, and I did so. I put one or two very simple questions to her with reference to religion, but I did not prosecute that inquiry. The little she said upon the subject shewed clearly that her ideas about the two churches and the difference between them were very superficial and very incorrect. Therefore, so far as her own present knowledge goes, it does not seem to me a matter of any importance. But this I do think very important—she is an intelligent girl, between fifteen and sixteen, and she certainly expressed a decided preference for remaining where she is, and, according to her lights, she said she preferred the Church of *England* to the Church of *Rome*. I do not feel that I have any jurisdiction to interfere with her. She has come to years of discretion sufficient to enable her to form an opinion of her own upon the subject, and she seems to me to have formed such an opinion, and if she desires to be brought up as a member of the Church of *England*, I think she has a right to be so brought up, and I shall act upon her view with respect to it. In my opinion, therefore, she must continue as she is.

Then, as regards the other two girls of thirteen and eleven. I was asked to see, and I did see, the girl of thirteen. I do not think I saw her to advantage. She appeared a good deal frightened and nervous at seeing me, and I did not deem it right

to put any question to her about her religious views. I put a good many questions to her and to her elder sister about their position, and the position of the youngest sister, and it is clear to me that they are all contented and happy where they are, and that they wish to remain there. I also saw the lady superintendent or matron of the school, and I obtained a good deal of information from her as to the scope and object of the school, and the system upon which it is conducted. It is under the control of a committee, who are, no doubt, members of the Church of *England*, and it may be called a school belonging to the Church of *England*; but the great object of the managers is to bring up the children of poor parents in such a way that they may be able to earn their own livelihood, and become useful members of the community. The managers very wisely, if I may say so, do their best to keep up their connection with the children who are educated there, when they afterwards, at the age of fifteen or sixteen, which is a very critical age, leave the school, more especially if, like these infants, they are orphans, and have no one upon whom they can fall back in case of difficulty. It seems to me very important that the eldest girl should remain at a school which supplies not only a present good training, but gives a chance of her being looked after when she has gone out into the world, and may require such assistance as she can obtain by going back to her old school. All control is not lost. Of course, the managers cannot compel children to go back there and consult them, but they hold out inducements to them to do so, and very often the desired result is obtained.

I think the three girls ought to be brought up in the same religion, and kept at the same school for the present. It will be a benefit to the eldest when she leaves the school that her sisters should remain there, for it will tend to keep up the advantageous connection between her and the school after she has left it. And, in the same way, when the time comes at which either of the younger sisters may leave the school, the fact that her sister or sisters is or are connected with it will tend to increase her interest in it, and the probability of her falling back upon the school for assistance or advice afterwards in case she may require it.

NORTH, J.

1892

In re McGRATH (INFANTS).

It is said that the result will be to sever them from their other relations. I hope it will not. One of their other relations, the next friend, is a retired domestic servant; she is only their great aunt, and, of course, there cannot be very much sympathy between her and them. Two other relations are their own aunts, their father's sisters; one of them is a member of *Nazareth House*, and the other is in domestic service, both of them, of course, in a very humble station of life. On the other hand, their brother is a member of the Church of *England*, and he has expressed his intention of remaining so. I hope no severance will be caused in the friendship of the relations towards one another, and I see no reason why anything of that nature should induce me to depart from the course which, on other grounds, I think best.

The youngest child stands in a different position. He is only six years old. He has been placed with the *Dwyers*. Mr. *Dwyer* is his mother's brother, and he is a Roman Catholic. It is a Roman Catholic family. For some time this boy went with Mr. *Dwyer's* younger children, one of whom is about the same age, to a Board school, but lately they have left that school, and they now all go to a school at *Notting Hill* connected with *St. John's Church*, a Church of *England* school. I have felt more difficulty as to what ought to be done about this boy, but I have come to the conclusion that I ought not to interfere with his religious education. Mrs. *Scrimgeour* is by far the best friend that these children have ever had, or perhaps are ever likely to have, and she has acted very kindly and charitably towards them. They must depend upon charity for being brought up, and Mrs. *Scrimgeour* has expressed her willingness to continue to provide for them as she has done in the past. It was said that, if the Roman Catholic guardians were appointed, they would provide for the children's education in some way. I was not told what their scheme would be, but I take it that an equally beneficial scheme would be suggested by them for the education and training of these children. Nevertheless, I think there are advantages in continuing them under the care of a lady who has by her past conduct proved that she has their interests so much at heart as Mrs. *Scrimgeour* has done. They have already experienced great kindness from

her, and I do not see any reason for removing them from her care for the sake of their obtaining elsewhere that which it is not suggested will be better, though no doubt it might be equally good.

Under all the circumstances I have come to the conclusion that, though, if the question had arisen four years ago, I must have held that these children ought to have been brought up as Roman Catholics, yet at the present time there is no reason for my giving any directions about their religious training. That being so, there is no ground for removing Mrs. *Scrimgeour*. It is admitted to be for their welfare that they should remain under her care, unless the religious question makes any difference. In my opinion, it does not. I think it unnecessary to say anything about the religion in which the children are to be brought up, but I shall leave Mrs. *Scrimgeour* as their guardian. My only order will be to dismiss the summons. Mrs. *Scrimgeour* offered by her counsel that, if necessary, she, remaining guardian, would undertake to bring up the children in the Roman Catholic religion. I have not forgotten that offer, but I do not think it is for the advantage of the children that I should act upon it. I have no doubt that, if I left the children in Mrs. *Scrimgeour's* care with such an undertaking, she would discharge her duty in that way. Still, I do not believe she would do it with the same zeal or interest in the children as at present, and I do not think it necessary for their welfare that I should require her to give the undertaking. I prefer to leave them with her, without saying anything about their religion.

Solicitors: *Leathley & Willes; A. E. Pridham.*

W. L. C.

KEKEWICH, J.

1892

May 6.

MERRYWEATHER *v.* MOORE.

[1892 M. 876.]

Master and Servant—Employer—Clerk—Trade Secrets—Communicating Information acquired during Service—Confidential Relation—Implied Contract—Injunction.

The Defendant, upon completing a term of apprenticeship with the Plaintiffs, a firm of engine-makers, was retained in their employment as a paid clerk, but he ultimately left their service for that of another firm of engine-makers. Two days before leaving the Plaintiffs' service he compiled for his own purposes, and without their knowledge or consent, a table of dimensions of various types of engines made by them, and this table he had in his possession when he entered the service of his new employers, who subsequently exposed for sale an engine of, it was said, dimensions corresponding to dimensions given in the table, though this was denied:—

Held, that, in compiling and retaining the table for his own purposes, the Defendant had committed an abuse of the confidence ordinarily existing between a clerk and his employer, or a breach of the implied contract apparently arising from that confidence, the confidence being that a servant shall not use, except for the purposes of service, the opportunities which that service gives him of gaining information; and accordingly that the Plaintiffs were entitled to an interim injunction restraining the Defendant from publishing or communicating the table or its contents to any person.

In 1881, the Defendant, *Edward J. Moore*, apprenticed himself, for the purpose of learning the business of mechanical engineering, to the Plaintiffs, a firm of fire-engine makers, for a period of five years. After having served his apprenticeship he was taken by the Plaintiffs into their employ as a draughtsman at a salary of 30*s.* a week. In May, 1891, *Moore* left the Plaintiffs' service, and entered the employment of the Defendants, *Mobbs & Co., Limited*, makers of machinery; and shortly afterwards that company, in conjunction with the Defendants, the *Sphincter Grip Armoured Hose Company, Limited*, commenced the business of fire-engine makers, under the style of "*The Fire Appliances Company*." From the evidence it appeared that about two days before leaving the Plaintiffs' employ the Defendant *Moore*, without their knowledge or authority, compiled a

table of dimensions of the various types of fire-engines made by the Plaintiffs, which dimensions the Plaintiffs claimed to be "trade secrets"; and the Plaintiffs stated their belief that these dimensions were taken for the purpose of being communicated to the Defendant companies, inasmuch as those companies had recently exhibited in their shop for sale a fire-engine of the same dimensions as those of one of the engines whose dimensions were given in the table in *Moore's* possession. The Plaintiffs then commenced this action, and now moved for an interim injunction to restrain the Defendant *Moore* from publishing or communicating to any person the paper or table of dimensions or the contents thereof; "which paper had been compiled by him in breach of his contract of employment with the Plaintiffs, and in breach of the confidence reposed in him by the Plaintiffs," and to restrain the Defendant companies from publishing or using, in the construction of fire-engines, or otherwise in the course of their trade or business, the information so obtained from the Plaintiffs by the Defendant *Moore*. The Defendant *Moore* deposed that he prepared the table merely for his general information; that when he left the Plaintiffs' service he placed the table with his engineering and mechanical text-books; that since he had been in the service of the Defendant companies he had not been employed in designing or making drawings for any fire-engines for which the table or any information therein could be of the slightest use; and he denied ever having shewn it to his present employers.

The managers of the Defendant companies deposed that they had never made use of or even seen the table in question; and they denied that the engine referred to by the Plaintiffs was of any of the dimensions therein stated.

Warmington, Q.C., and *T. E. Scrutton*, for the Plaintiffs:—

The principle is clearly established that a clerk is under an implied contract not to make public that which he learns in the execution of his duty as clerk: *Tipping* v. *Clarke* (1); *Prince Albert* v. *Strange* (2); *Morison* v. *Moat* (3); *Tuck & Sons* v.

(1) 2 Hare, 383, 393.
(2) 1 Mac. & G. 25, 45.
(3) 9 Hare, 241.

KEKEWICH, J.
1892
MERRY-WEATHER v. MOORE.

Priester (1). The object of the Defendant, *Moore*, in making out this table, was evidently to make use of it for his own purposes; and we submit that the evidence is sufficient to shew that the Defendant companies must have made use of the information supplied to them by *Moore* by means of the table for the purposes of their own business, and to the manifest injury of the Plaintiffs.

Kerly, for the Defendant *Moore*:—

The evidence does not shew that the Defendant *Moore* has made use of this table, or that he has threatened to use it, and that alone is a sufficient ground for refusing an injunction: *Morison* v. *Moat* (2). This is analogous to the case of a pupil in a conveyancer's chambers, who, as is well known, is at liberty to copy and use the precedents which come before him as pupil. As in *Reuter's Telegram Company* v. *Byron* (3), the information which *Moore* obtained could have been acquired by any one, and was in no sense in the nature of a trade secret, and this case is distinguishable on that ground from the cases cited: for the table in question contained dimensions of engines in the market or in different parts of the country, which would be open to the inspection of any one. There is, therefore, nothing secret or confidential in the case.

Marten, Q.C., and *Arnold Statham*, for the Defendant companies, contended that the evidence did not establish any case as against them, and referred to *Reuter's Telegram Company* v. *Byron*.

Scrutton, in reply:—

In such cases the Court has interfered on the ground either of implied contract or of breach of confidence, as in *Abernethy* v. *Hutchinson* (4), and *Caird* v. *Sime* (5). In *Reuter's Telegram Company* v. *Byron*, the reason why the Court refused to interfere was because there was no contract, either express or implied, and no confidence arising from the relationship between

(1) 19 Q. B. D. 629, 639.
(2) 9 Hare, 241, 267.
(3) 43 L. J. (Ch.) 661.
(4) 3 L. J. (O.S.) (Ch.) 209; 1 H. & T. 28.
(5) 12 App. Cas. 326.

the parties. The question here is, was *Moore*, the clerk, acting for his employers or for himself when he made out this table? It is not pretended that in doing so he was serving his employers: what he did was obviously intended for his own advantage. He was not justified in making use of his position as a servant to obtain this information for the benefit of himself, any more than he would be justified in taking away copies of or extracts from working drawings.

[KEKEWICH, J., asked whether the Defendant companies disclaimed any intention of making use of the table?

Marten, Q.C.:—Yes, and they are willing now so to disclaim by their counsel.]

KEKEWICH, J.:—

There is some manifest inconvenience in my trying this question on motion, because, whatever is done or not done, it is impossible that there should not be some expression of opinion, either in the words used by the Court or in the form of order, on the main question between the parties; and yet that main question comes before the Court under circumstances which are not altogether satisfactory. There are one or two points of evidence on which, certainly, it would be better to have the witnesses for cross-examination, to see how they stand that test, and to observe their demeanour, and to contrast one detail with another. Again, I am entirely without any evidence respecting the course of trade. I am obliged to draw on such resources as reported cases referring to entirely different subjects will give me, and on one's general knowledge of usage among persons who teach and are taught. I have no evidence at all to shew me what is the usage in this particular trade or in any other like trade. Yet, as the case has been argued out on this motion, I must, notwithstanding any inconvenience, do my best between the parties upon the evidence before me; and I propose to deal differently with the case of Mr. *Moore* and the case of the two Defendant companies.

What is the state of the law as regards a gentleman occupying the position of clerk or servant in the employ of a professional

KEKEWICH, J.
1892
MERRYWEATHER v. MOORE.

man or a tradesman, that is to say, a person carrying on a professional or commercial business? It is laid down in clear terms in several cases which have been cited, and there really is no dispute about it. The law is taken from *Tipping* v. *Clarke* (1); and that law is repeated in *Prince Albert* v. *Strange* (2). It is again to be found in other cases, and it is summed up in a few words in a recent case which was not cited, and which I do not refer to for its facts, namely, *Pollard* v. *Photographic Company* (3) before Mr. Justice *North*, who says (4): "It is quite clear that, independently of any question as to the right at law, the Court of Chancery always had an original and independent jurisdiction to prevent what that Court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence;" and for that he refers to *Prince Albert* v. *Strange*. As pointed out by Mr. *Scrutton* in reply, it is sometimes difficult to say whether the Court has proceeded on the implied contract or the confidence, for I will put aside once for all any cases arising on express contract. Perhaps the real solution is that the confidence postulates an implied contract: that, where the Court is satisfied of the existence of the confidential relation, then it at once infers or implies the contract arising from that confidential relation—a contract which thus calls into exercise the jurisdiction to which I have referred.

Having referred to the authorities for the principle, there is no occasion to notice any particular examples; but there is one case which was cited on behalf of Mr. *Moore*, and again cited by Mr. *Marten* on behalf of the companies, namely, *Reuter's Telegram Company* v. *Byron* (5), which, while being a case in the Defendants' favour to this extent, that the injunction was refused, shews precisely why it was refused, and that the reason was that the principles which the late Master of the Rolls of course accepted could not be applied to the particular facts of that case. At the very end of his judgment (6)—after stating that the plaintiffs, a telegram company, were seeking to restrain the

(1) 2 Hare, 383.
(2) 1 Mac. & G. 45.
(3) 40 Ch. D. 345.
(4) 40 Ch. D. 354.
(5) 43 L. J. (Ch.) 661.
(6) Ibid. 663.

defendants, who had acted as their agents or correspondents in *Australia* but had since severed their connection with the plaintiffs, from making use of knowledge acquired while the relation of principal and agent subsisted, after that relation had terminated—says this: "I am not aware of any authority in which this has been done in the absence of a contract expressed or implied." He says that, if the confidence ordinarily arising from the relation of principal and agent does not exist, the contract cannot be implied, and an injunction will not be granted: and in that case he held that there was not that confidence, and that, therefore, there was not any contract. He went through the case and explained why the correspondents abroad of a telegram company in *England* were in a different position from ordinary agents, and were under no liability to exercise that reticence which would have been required of them if they had been confidential agents.

Now, here I have a gentleman formerly apprenticed to the Plaintiffs; apprenticed, of course, to learn his trade. It is immaterial to consider whether he paid a fee, or what the terms of his articles were; generally speaking, the object was, to him that he should learn his trade, to them that he should give them, besides any fee which he might have paid, such services as he could perform. No question arises respecting his duty during that apprenticeship. If there did, I might have thought it right further to consider the matter; but after the termination of his apprenticeship he is taken into the employment of his principals as a paid clerk; and from that time forward the duty to instruct on the part of the employer ceases, and then the bargain must be—I am not told what it actually was—that the clerk shall give his full time during the ordinary office hours to the employer in exchange for proper accommodation and proper remuneration, all which is a matter of bargain. I cannot imply from that relation any obligation on the part of the employer to instruct the clerk, or to enable him to inform himself otherwise than by doing his work. If he is able, in the progress of his work, to learn, an object which he ought of course to have before him, that will be so much the better for him in the course of his employment as giving him a claim to higher remuneration and a

KEKEWICH, J.
1892
MERRYWEATHER v. MOORE.

better position, and also better for him in future years; but I see no obligation on the part of the employer to instruct him or to give him the opportunity, otherwise than by doing his work, of instructing himself. I see no obligation on the part of the employer to put the books and materials at his disposal for the purpose, if he so pleases, of employing his spare hours in the advancement of his learning in the particular trade. It is simply a bargain that, for so much money or other remuneration, the clerk shall perform such and such services. He, being in that relation, thinks fit, within a few days of his leaving the service of his employers, and when he of course knew that he was leaving their service, and when therefore anything that he did would be of no advantage to them, to draw out this table. It may be that this table was compiled from data which were at his disposal as clerk in the employment of the Plaintiffs. It may be that with care all these details might have been obtained by inspection of the different engines which were either at hand or available, perhaps, through working drawings, or otherwise; but in this particularly compendious form it is common ground that these materials did not exist. Mr. *Moore* considered it to be for his benefit that they should exist, and exist in his possession; and he must be taken, whatever he says, to have intended to use them for his own purposes. Was it lawful for him to do that? Is it right that he should either retain or use these materials? If he can carry them in his head, no one can prevent his doing that and making use of them. But the question is, is not this an abuse of the confidence necessarily existing between him and his employers—a confidence arising out of the mere fact of employment, the confidence being shortly this, that the servant shall not use, except for the purposes of service, the opportunities which that service gives him of gaining information? In my opinion, though I admit the question to be one of some novelty and difficulty, this is an abuse of the confidence necessarily arising out of the circumstances; and I think the abuse is shewn and evidenced by the fact of this table having been compiled during the last few days of his service, when it is idle to say that it was done for any purpose that could be of the slightest advantage to the employers.

Mr. *Scrutton* made an extremely valuable remark in his reply. If Mr. *Moore* was at liberty to compile this table from the materials before him, he might have made extracts from the working drawings which were no doubt under his hand: he might have made copies of the working drawings as a whole or of any part: he might have copied that which, without being patented or protected by a trade-mark, was nevertheless peculiarly valuable to the Plaintiffs' firm, and have carried away elsewhere the means of doing that which he had learnt to do there. One might suppose other abuses, but the working drawings furnish an example which seems to me directly apposite. It is impossible to draw a line with any accuracy and to say that to do this would be an abuse of the confidence, and to do that would not. It is impossible to lay down a general rule with reference to all trades and all professions. The circumstances may vary. It was put in the course of argument that the pupil of a conveyancer copies precedents. The answer is that, though no express contract has, I suppose, ever been made, it is certainly the unwritten law of the profession that barristers who take pupils shall allow them to have their books of precedents, not only for consultation, but to copy; and we all know that, not only as regards conveyancers' precedents, but still more, perhaps, as regards pleading precedents, in olden times they were of such great value that many gentlemen went into particular chambers for the mere purpose of employing themselves in that dry work of copying precedents. We all know what a long time Lord *Campbell* spent in copying precedents in a pleader's chambers. I say one cannot draw the line exactly; but the present case, for the reasons I have mentioned, seems to me to go beyond the line and to be an abuse of confidence, and therefore I think Mr. *Moore* must be restrained from publishing or communicating to any person this particular paper or the contents thereof.

As regards the companies, there is certainly an element of suspicion in the case. There is a good deal to be said in support of that suspicion, but the evidence displaces it for the present purpose; and as Mr. *Marten* is willing on their behalf that the order shall contain an express disclaimer of their intention to make use of this paper for any purpose, I think that I ought not

KEKEWICH, J. 1892 MERRYWEATHER v. MOORE.

to grant any injunction against them. I come to that conclusion on the ground that they have not threatened to use it, that there is no proof of their intention to use it, which intention they have disclaimed, and that the evidence has not established any reasonable probability of their using it. Possibly a case may be made hereafter against them, but I will not prejudice that question either one way or the other by making any comments on the evidence beyond what I have already made. I will leave that entirely open; and with the same view, in order that there may be no indication of any opinion on my part, which I may say candidly I have not formed, I had better deal with the costs by making them costs in the action.

Accordingly there will be an interim injunction against the Defendant, Mr. *Moore*, but no order against the Defendant companies, upon their, by their counsel, disclaiming any intention to publish or use this paper or its contents. The costs of the Plaintiffs and of the Defendant companies will be costs in the action.

Solicitors: *R. J. Witty; Kerly, Son, & Verden.*

G. I. F. C.

END OF VOL. II.

The Mode of Citation of the Volumes of the Law Reports, commencing January 1, 1892, will be as follows :—

In the First Series,
[1892] 1 Ch. [1892] 2 Ch. [1892] 3 Ch.

In the Second Series,
[1892] 1 Q. B. [1892] 2 Q. B. [1892] P.

In the Third Series,
[1892] A. C.

INDEX.

AFFIDAVIT—Filing of, after motion heard—Entering as read - - - 462
See Practice. 1.

AFTER-ACQUIRED PROPERTY—Covenant to settle—Infant - - - 278
See Infant. 3

—— Undischarged bankrupt—Title to real estate
See Bankruptcy. [138

AMENDMENT—Notice of opposition to trade-mark - - - - 245, 462
See Trade-mark. 1, 4.

ANNUITY—Widow—Satisfaction of dower—Priority - - - - 295
See Will. 1.

APPEAL—For costs - - - - 134
See Practice. 2.

ARTICLED CLERK—Covenant not to transact business with clients - - 413
See Solicitor. 1.

ATTACHMENT—Trustee—Debtors Act - 60
See Debtors Act.

BANKRUPTCY—*Vendor and Purchaser—Doubtful Title—Undischarged Bankrupt—After-acquired Property—Real Estate—Intervention of Trustee—Property vesting in Trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 58, 118.] A testatrix, who died in April, 1890, devised her real estate to her nephews, W. and J., as tenants in common in fee. In October, 1890, W. and J. purported to convey this real estate to a land company, who, in May, 1891, entered into a contract for sale thereof to a purchaser. The purchaser before completion discovered, that in 1888 W. had been adjudicated bankrupt, and that he was still undischarged. The trustee in W.'s bankruptcy now intervened and claimed to be entitled to a moiety of this real estate :—*Held*, by Chitty, J., explaining and distinguishing *Cohen* v. *Mitchell* (25 Q. B. D. 262), that an undischarged bankrupt cannot, even before the intervention of the trustee in bankruptcy, convey real estate acquired after the bankruptcy to a bonâ fide purchaser for value, so as to give a good title to such purchaser as against the trustee :—

BANKRUPTCY—*continued.*

Held, by Chitty, J., and on appeal, that in any case the title was too doubtful to be forced on a purchaser, and that on that ground alone the purchaser was entitled to be relieved from his contract :—*Semble, per* Court of Appeal: The proposition laid down in *Cohen* v. *Mitchell*, viz., that until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value, in respect of his after-acquired property, are valid against the trustee, was not intended to apply to real estate. *In re* New Land Development Association and Gray - - C. A. 138

BILL OF COSTS—Taxation - - - 343
See Solicitor. 2.

BILL OF SALE—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 1—*Principal and Agent—Agreement making Goods in Agent's hands Security for his Advances to Principal.*] By an agreement in writing, made between the Defendant, a foreign manufacturer, and the Plaintiff, his agent in England, it was provided that advances made by the Plaintiff for expenses should be "covered and secured by the stock of goods, which shall be in his hands," which the Defendant bound himself should not fall below a certain value.—The Defendant terminated the agency and asserted the right to remove the goods remaining in the Plaintiff's hands without satisfying his claims for the expenses of the agency, upon the ground that the agreement conferred a right in equity to, or created a security upon, the goods, and, not having been registered as a bill of sale, was void.—In an action by the Plaintiff for wrongful dismissal :—*Held*, (1) that the agreement did not empower the Plaintiff to seize any goods, but merely entitled him to retain possession of goods after they had come into his hands; (2) that when the goods had come into his hands there was an agreement coupled with possession which created a legal and not an equitable right, and consequently that, according to the principle of *Reeves* v. *Barlow* (12 Q. B. D. 436) and *Ex parte Hubbard* (17 Q. B. D. 690),

BILL OF SALE—*continued.*
the agreement was not void as a bill of sale within the meaning of the Bills of Sale Act, 1882. MORRIS *v.* DELOBBEL-FLIPO - - - 352
BREACH OF TRUST—Person assisting in—Liability - - - - - 265
See TRUSTEE.
BUILDING—Overhanging - - - 53
See VENDOR AND PURCHASER. 2.
BUILDING LINE—Open spaces - - 404
See METROPOLIS MANAGEMENT ACT.

CANAL—Support—Adjacent mines - 432
See SUPPORT.
CAPITAL—Accretion to—Payment of dividends out of - - - - 198
See COMPANY. 5.
CASES—*Auckland, Lord* v. *Westminster District Board of Works* (Law Rep. 7 Ch. 597) distinguished - - - 404
See METROPOLIS MANAGEMENT ACT.
—— *Benfieldside Local Board* v. *Consett Iron Company* (2 Ex. D. 54) considered 432
See SUPPORT.
—— *Challender* v. *Royle* (36 Ch. D. 425) distinguished - - - - 1
See PATENT. 1.
—— *Cohen* v. *Mitchell* (25 Q. B. D. 262) explained - - - - 138
See BANKRUPTCY.
—— *Cormack* v. *Beisly* (3 De G. & J. 157) followed - - - - 368
See SOLICITOR. 3.
—— *Davies* v. *Wright* (32 Ch. D. 220) considered
See MORTGAGE. [111
—— *Doidge* v. *Carpenter* (6 M. & S. 47) distinguished - - - - 374
See COMMON.
—— *Exmouth Docks Company, In re* (Law Rep. 17 Eq. 181) not followed - - 362
See COMPANY. 2.
—— *Firbank's Executors* v. *Humphreys* (18 Q. B. D. 54) distinguished - 452
See COMPANY. 3.
—— *Furneaux* v. *Rucker* (W. N. (1879) 135) explained - - - - 38
See INFANT. 2.
—— *Genery* v. *Fitzgerald* (Jac. 468) followed 38
See INFANT. 2.
—— *Herne Bay Waterworks Company, In re* (10 Ch. D. 42) not followed - - 362
See COMPANY. 2.
—— *Hubbard, Ex parte* (17 Q. B. D. 690) followed - - - - 352
See BILL OF SALE.
—— *Jeffery, In re* ([1891] 1 Ch. 675) dissented from - - - - - 38
See INFANT. 2.
—— *Lee* v. *Neuchatel Asphalte Company* (41 Ch. D. 1) followed - - - 124
See COMPANY. 4.
—— *L'Fit* v. *L'Batt* (1 P. Wms. 526) corrected
See WILL. 3. [229
—— *Mundy's Settlement, In re* ([1891] 1 Ch. 399) followed - - - - 219
See SETTLED LAND ACT. 4.

CASES—*continued.*
—— *North* v. *Stewart* (15 App. Cas. 452) distinguished - - - - 368
See SOLICITOR. 3.
—— *North London Land Company* v. *Jacques* (32 W. R. 283) distinguished - 170
See LANDLORD AND TENANT. 1.
—— *Reeves* v. *Barlow* (12 Q. B. D. 436) followed
See BILL OF SALE. [352
—— *Roper* v. *Roper* (3 Ch. D. 714, 719) dictum disapproved - - - 295
See WILL. 1.
—— *Shelley's Case* (1 Rep. 93 b) distinguished
See SETTLEMENT. [173
—— *Stogdon, In re* (56 L. J. (Ch.) 420) explained
See SOLICITOR. 2. [343
—— *Wadsworth, In re* (34 Ch. D. 155) followed
See SOLICITOR. 3. [368
—— *Woolley* v. *Colman* (21 Ch. D. 169) considered - - - - 111
See MORTGAGE.

CLERK—Trade secrets—Confidential relation
See MASTER AND SERVANT. [518

COMMON—*Manor—Rights of Common—Ancient Arable Land—Customary Freeholds—Release of Seignorial Rights—General Words in Conveyance.*] Prior to the 12th of August, 1859, the Plaintiff was entitled to a customary estate in fee simple in a piece of ancient arable freehold land held of the lord of the manor at a quit rent, heriot, and relief, and as owner and occupier was entitled to the rights of common enjoyed by the freehold tenants of the manor.—On the 12th of August, 1859, the lord of the manor enfranchised and released the piece of land to the Plaintiff in fee, discharged from all quit rents, heriots, reliefs, and other services of free tenure:—*Held*, by Stirling, J., that although rights of common annexed to copyholds are extinguished on enfranchisement, there is no similar doctrine with reference to the extinguishment of rights of common on the release of seignorial rights in ancient arable lands of customary freehold tenure, and accordingly that the Plaintiff's rights of common had not been extinguished by the enfranchisement.—This decision was not appealed from.—The lord of the same manor sold to the Plaintiff in 1859 a piece of land forming about one-fifth part of a farm which was part of the demesne lands of the manor, and conveyed it to him, "together with all ways, ... commons, and all other rights, members, and appurtenances to the said piece of land, or any part thereof belonging." The farm had for many years been in the occupation of lessees, who uniformly and extensively exercised rights of common over the wastes of the manor. On the completion of the sale, the tenant of the farm, whose lease had not expired, gave up by arrangement possession of the piece of land to the purchaser, who paid him the value of his tillages; but it did not appear that any formal surrender or assignment was made. The lease was not mentioned in the conveyance:—*Held*, by the Court of Appeal (affirming the judgment of Stirling, J.), that the Plaintiff had no right of common in respect of this piece of land, for that inasmuch as the land was part of the demesnes of

COMMON—*continued.*

the manor, no right of common was attached to it, the lord and his tenants having enjoyed common by virtue of the lord's ownership of the waste; that in the absence of any special relation between the parties, the words used were insufficient to create a right of common; and that *Doidge* v. *Carpenter* (6 M. & S. 47), where similar words in a grant were held to create the right, did not govern the present case, as in that case the grant was a grant by the lord of the whole farm to the tenant, and the intention was necessarily to be inferred that the tenant should take in perpetuity whatever he had enjoyed under his lease, whereas here the grant was only a grant of part of the land to a stranger. BARING *v.* ABINGDON - - - - C. A. 374

COMPANY—*Debenture—Land out of Jurisdiction—Mortgage.—Receiver.*] A company incorporated by an American State, and domiciled in the United States, created an equitable charge on land in Mexico for payment of a debenture debt. The land became vested in an English company subject to an express obligation by them to pay off such charge out of the proceeds of sale of the property:—*Held*, on motion for a receiver of the rents and other money to arise from the land, that the English company and its directors were accountable in an English Court to the debenture-holders for proceeds of such land come to their hands; but, under the circumstances, the Court being of opinion that a receiver would be useless, the motion was refused. MERCANTILE INVESTMENT AND GENERAL TRUST COMPANY *v.* RIVER PLATE TRUST, LOAN, AND AGENCY COMPANY - - - - - - 303

2. —— *Debenture-holder—Receiver—Right to present Winding-up Petition—Statutory Powers of Public Advantage.*] A tramway company incorporated in 1883 by Act of Parliament, in exercise of a power conferred upon them by their Act, issued debentures in the form prescribed by Schedule C to the Companies Clauses Act, 1845, which was incorporated in the special Act. The time for repayment of the principal owing upon the debentures had expired without its being repaid. A debenture-holder, who had brought an action to enforce his security, and had obtained the appointment of a receiver, presented a petition to wind up the company:—*Held*, that the exercise of his remedy as a debenture-holder did not deprive him of his right as an ordinary creditor to present a winding-up petition, and that he was entitled to the order.—*In re Herne Bay Waterworks Company* (10 Ch. D. 42), and *In re Exmouth Docks Company* (Law Rep. 17 Eq. 181), not followed. *In re* BOROUGH OF PORTSMOUTH (KINGSTON, FRATTON AND SOUTHSEA) TRAMWAYS COMPANY - - - 362

3. —— *Director—Principal and Agent—Representation — Liability.*] The Plaintiffs contracted to supply goods to a company to be paid, as to £600, in first mortgage debentures of the company, and as to the balance by the company's acceptances. The contract was made at a board meeting of the company at which the Defendant was chairman, and which was attended by the Plaintiffs' representative. The Plaintiffs repeatedly pressed for their debentures, and were

COMPANY—*continued.*

put off by promises contained in letters written by the secretary of the company with the knowledge of the Defendant as a director; but eventually the company was ordered to be wound up without the Plaintiffs having obtained their debentures. At the time the contract was made the Defendant knew that the whole of the first mortgage debentures of the company had been issued except £4950, which were deposited with the bankers of the company as security for the company's overdraft (which was also guaranteed by the directors) under an arrangement by which the company could at any time withdraw any of the debentures on paying the nominal amount thereof in cash. In an action by the Plaintiffs to make the Defendant personally liable for the £600 on the ground that his acts were a representation that he had authority to say the company could issue the debentures at a time when he knew they had no debentures available for the purpose:—*Held*, that the Defendant was not liable. *Firbank's Executors* v. *Humphreys* (18 Q. B. D. 54) distinguished. ELKINGTON & Co. *v.* HÜRTER - - - - - 452

4. —— *Dividends—Land Company—Paying Dividends out of Capital—Balance Sheet—Profit and Loss Account—Writing off Losses—Writing up Increased Value of Land.*] The principal objects of a limited company were to buy, let, and sell land, and to make advances on land and the produce thereof. The articles of association provided that dividends should be paid out of net profits, and authorized the directors, if they thought fit, to create a reserve fund out of profits to meet contingencies. In 1882 the company had a bad debt of £72,000 odd, and they met this by writing up in the balance sheet of that year the value of their lands some £69,000 above cost price, and brought down such increased value into the credit side of the profit and loss account as a set-off against the bad debt, which was in this way treated as written off. In 1885 the company made a profit on revenue account, out of which the payment of a dividend was proposed.—In a shareholder's action to restrain the payment of the proposed dividend, on the ground that what was done in the profit and loss account for 1882 was wrong, that some of the company's lands had by 1885 much depreciated in value (of which there was some evidence), and that if such depreciation was debited in the profit and loss account of 1885 there would be a considerable loss and no fund available for dividends:—*Held*, on the Plaintiff's evidence, and without hearing the evidence for the Defendants, that no case was made out for the interference of the Court, and that the action must be dismissed; for that, assuming what was done in the profit and loss account of 1882 was erroneous, and the company's assets in 1885 were too highly valued, so that such assets, if truly valued, would shew a considerable loss of the share capital, the company were not bound to adopt the course taken in 1882, and to bring the depreciation of 1885 into the profit and loss account of that year.—*Lee* v. *Neuchatel Asphalte Company* (41 Ch. D. 1) followed. BOLTON *v.* NATAL LAND AND COLONIZATION COMPANY - - - - 124

COMPANY—*continued.*

5. —— *Dividends—Sale of Part of the Undertaking—Accretion to Capital—Capital or Profits—How Profits are to be ascertained.*] A banking company with a paid-up capital of £500,000, sold part of its undertaking for £875,000; after deducting the paid-up capital and other incidental expenses there remained a net balance of £205,000; the directors proposed to treat this balance as profit:—*Held*, that the £205,000 was profit on capital, and not part of the capital itself, and that the directors would be justified in carrying this sum to the profit and loss account, and after appropriating to the reserve fund so much as they thought proper, might distribute the remainder as dividends.—Principles on which the accounts of a trading company should be kept stated. LUBBOCK *v.* BRITISH BANK OF SOUTH AMERICA [198

6. —— *Winding-up — Contributories— Director's Qualification Shares—Implied Contract to take Shares.*] Where a person has accepted the office of director of a company, and has acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration and benefits provided by the articles for the directors.—The articles of association of a company provided that the qualification of a director should be the holding of shares of the nominal amount of £1000, that a first director might act before acquiring his qualification but should in any case acquire it within one month from his appointment, and, unless he should do so, he should "be deemed to have agreed to take the said shares from the company, and the same should be forthwith allotted to him accordingly." Sir H. I. signed both the memorandum and articles of association for one share. He was appointed one of the first directors, and acted as such for more than a year; but he never applied for any shares, nor were any ever allotted to him, and he was never registered as a member of the company. There were at all times down to the winding-up of the company sufficient shares to enable an allotment of shares to the amount of his qualification to be made to him:—*Held*, by the Court of Appeal (affirming the judgment of Stirling, J.), that Sir H. I. had, under the circumstances, agreed with the company to take, and that the company had agreed to allot to him, the shares which constituted his qualification as a director, and, accordingly, that he was liable to be settled upon the list of contributories in respect of that number of shares. *In re* ANGLO-AUSTRIAN PRINTING AND PUBLISHING UNION. ISAACS' CASE - - - C. A. 158

7. —— *Winding-up—Official Receiver acting as Liquidator — Rejection of Proof — Appeal—Jurisdiction of Liquidator to consider Set-off — Costs — Companies (Winding-up) Rules*, 1890, *rr.* 110, 111, 112, 178—*Companies (Winding-up) Rules*, 1892, *r.* 3.] Appeals from the Official Receiver, which by rule 3 of the Companies (Winding-up) Rules, 1892, are to be heard before the Judge in open Court, are only appeals from the Official Receiver acting as such, and do not include appeals from the Official Receiver when acting as liquidator; applications by way of appeal from his decisions as liquidator must be made in Chambers. — A liquidator, when examining a proof of debt with a view to its admission or rejection, is entitled also to examine a set-off to such proof, if it is a matter of account, in order to arrive at the amount, if any, for which the proof is to be allowed.—On a successful appeal from the rejection of a proof in the winding-up of a company, the rule in bankruptcy is followed, that the applicant is allowed his costs, not of the proof, but of the appeal, out of the assets. *In re* NATIONAL WHOLEMEAL BREAD AND BISCUIT COMPANY - - - - - - 457

8. —— *Winding-up—Provisional Liquidator —Official Receiver—Fixing of Security by Board of Trade—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 4, *sub-ss.* 1, 2, 5; *s.* 31, *sub-s.* 3; *s.* 32, *sub-s.* 3—*Companies (Winding-up) Rules*, 1890, *rr.* 32, 67.] Whether, under sect. 4 of the Companies (Winding-up) Act, 1890, the Court has power to appoint as provisional liquidator of a company, before a winding-up order has been made, any other person than the Official Receiver, *quære*.—But, assuming that there is power to appoint another person, as a general rule the Official Receiver will be appointed.—Under rule 67 of the Companies (Winding-up) Rules, 1890, the Board of Trade has power to fix the security to be given by the liquidator of a company before as well as after the making of a winding-up order.—By virtue of sect. 32, sub-sect. 3, of the Companies (Winding-up) Act, 1890, that Act applies to a company which has not a registered office in England, but has carried on business there. *In re* MERCANTILE BANK OF AUSTRALIA - - - - - 204

9. —— *Winding-up — Secured Creditor — Amendment of Proof—Inadvertency—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 6, *sub-s.* 2; *Sched. I., r.* 8.] A creditor, the holder of a direct security, believing it to be collateral, proved for and voted in respect of his whole debt in the winding-up of a company. He was allowed to place a value on his security and to amend his proof by reducing it by such value and retain the benefit of the security notwithstanding that he had voted on the whole debt after hearing a statement that the security was not collateral but direct. *In re* HENRY LISTER & CO., LIMITED. *Ex parte* HUDDERSFIELD BANKING COMPANY - - 417

—— Savings bank - - - - 100
See SAVINGS BANK.

CONTRACT—By letters - - - 27
See VENDOR AND PURCHASER. 1.

CO-OWNERS—Patent—One co-owner mortgagee of the other's share - - 13
See PATENT. 1.

COSTS—Judgment in default of defence—Discretion of judge - - - 134
See PRACTICE.

—— Lien for - - - - - 368
See SOLICITOR. 3.

—— Taxation—After payment - - 343
See SOLICITOR. 2.

COVENANT—Lease—Best rules of husbandry 253
See LANDLORD AND TENANT. 3.
—— Validity—Restraint of trade - - 149
See RESTRAINT OF TRADE.
CURTESY—Tenant by—Married Women's Property Act - - - - 336
See HUSBAND AND WIFE. 2.
CUSTOMARY FREEHOLD—Right of common 374
See COMMON.

DEBENTURE — Receiver — Land in foreign country - - - - 303
See COMPANY. 1.
—— Receiver — Right to present winding-up petition - - - - 362
See COMPANY. 2.
DEBTORS ACT (41 & 42 *Vict. c.* 54)—*Trustee—Writ of Attachment—Privilege of Parliament.*] In exercise of its discretion (under the Debtors Act, 1878) the Court refused to allow a writ of attachment to issue against a trustee in default for not obeying an order to pay into Court the amount of misapplied trust money, where the trustee had received no personal benefit from breach of trust and was unable to pay:—*Query*, whether such trustee, being a peer of the realm, was entitled to privilege from arrest. EARL OF AYLESFORD *v.* EARL POULETT - - 60
DELAY—Injunction to restrain threats — Infringement of patent - - 1
See PATENT. 1.
DIRECTOR—Qualification—Contract for shares
See COMPANY. 6. [158
—— Representations by—Liability - 452
See COMPANY. 3.
DISCLAIMER—Trade-mark—Initial letters 301
See TRADE-MARK. 2.
DIVIDENDS—Payment out of capital 124, 198
See COMPANY. 4, 5.
DOWER—Annuity in satisfaction of dower—Priority - - - - 295
See WILL. 1.
—— Tenant pur autre vie - - - 87
See WILL. 2.

EASEMENT—Support—Canal—Adjacent mines
See SUPPORT. [432
EXECUTION — Equitable — Judgment — Reversionary interest in personalty - 428
See JUDGMENT.

FOREIGN WILL—Inaccurate English translation admitted to probate - - 229
See WILL. 3.
FORFEITURE—Lease—Relief against 170, 328
See LANDLORD AND TENANT. 1, 2.

GENERAL WORDS—Right of common - 374
See COMMON.
GUARDIAN—Infant—Removal by Court - 496
See INFANT. 1.

HUSBAND AND WIFE—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5—
HUSBAND AND WIFE—*continued.*
Married Woman—Will made during Coverture prior to the Act—"Separate property" acquired after the Act.] The will of a married woman, who dies in the lifetime of her husband, made during coverture and prior to the coming into operation of the Married Women's Property Act, 1882, she having at the time capacity to make will, is effectual without re-execution to pass separate property which she may acquire under the provisions of the Act. *In re* BOWEN. JAMES *v.* JAMES - - - - - 291

2. —— *Real Estate of Wife — Devolution—Tenancy by the Curtesy—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, *sub-s.* 1, 5.] Notwithstanding the provisions of sect. 1, sub-sect. 1, and sect. 5 of the Married Women's Property Act, 1882, a husband is still entitled, on the death of his wife, to an estate by the curtesy in her undisposed of real estate. HOPE *v.* HOPE [336

IMPROVEMENTS—Agricultural lease—Market garden - - - - 253
See LANDLORD AND TENANT. 3.
—— Settled Land Act - 219, 233, 318
See SETTLED LAND ACT. 1, 4, 5.

INFANT—*Guardian—Removal by Court—Jurisdiction—Religious Education—Wishes of Deceased Father — Welfare of Infant — Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *ss.* 2, 3, 6, 13.] The Court has jurisdiction to remove a guardian of infants appointed by their mother (after the father's death), under the power conferred on her by sect. 3 of the Guardianship of Infants Act, 1886, if it is satisfied that it is for the welfare of the infants to do so.—The jurisdiction of the Court in relation to infants extends to infants who are not wards of Court, and who have no property.—A journeyman tailor, who was a Roman Catholic, in 1876 married a woman who was a Roman Catholic. There were six children of the marriage, all of whom, except one who died at the age of four months, were baptized as Roman Catholics. The five children who survived were, a boy born soon after the marriage, three girls born respectively in 1877, 1879, and 1881, and a boy born in 1886. The father died in June, 1888. He was at the time of his death a Roman Catholic, though during his life he had not paid much attention to religion. He was attended by a Roman Catholic priest on his death-bed, and was buried as a Roman Catholic. He expressed no wish as to the religion in which his children should be brought up. During his lifetime the children sometimes attended a Protestant school on Sunday and attended Protestant places of worship, and he knew that they did so. He never spoke to them about religion. In 1886 the eldest boy was with the father's consent placed in an industrial home, which was conducted on the principles of the Church of England. This boy afterwards went into domestic service. The eldest girl was, from November, 1885, down to the time of her father's death, educated chiefly at a Roman Catholic school, but during the six months preceding her father's death she attended more or

INFANT—*continued.*

less at a Board school. The two younger girls were from November, 1885, to April, 1888, educated at a Roman Catholic school. Just before their father's death they were placed in a Roman Catholic establishment, but while there they occasionally attended a Protestant school on Sunday. After the father's death the mother was in very poor circumstances, and a benevolent lady, who was a member of the Church of England, rendered her regular pecuniary assistance. In November, 1889, the mother executed a deed by which, in exercise of the power conferred on her by the Guardianship of Infants Act, 1886, she appointed this lady to be guardian after her own death of the three girls and the younger boy. In April, 1890, the three girls were removed from the Roman Catholic school at which they had been, and were sent to a Board school. The two younger girls remained there till their mother's death on the 30th of July, 1891. The elder girl was in December, 1890, under the directions of the same lady placed in an industrial home, which was conducted on the principles of the Church of England. In May, 1891, she was taken home to attend on her mother, who was then dying. Immediately after her mother's death she was taken back to the industrial home, and the younger girls were also taken there. The mother before her death became a Protestant. The younger boy went to live in the house of his mother's brother, who was a Roman Catholic, and with his uncle's children attended first a Board school, and afterwards a National school. In November, 1891, an aunt of the father, who was a Roman Catholic, acting as next friend of the four younger children, took out a summons asking that the guardian might be removed, and the next friend and a Roman Catholic lady appointed joint guardians of the four children:—*Held*, that, though, if an application had been made immediately after the father's death, the Court must have directed that the children should be brought up in their father's religion, yet, having regard to all the circumstances, it would not be for the welfare of the children that the guardian should be removed, and that no direction ought to be given as to the religious education of the children.—The summons was accordingly dismissed. *In re* McGrath (Infants) - - - - - **496**

2. —— *Maintenance — Contingent Interest — Intermediate Income—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.] A testator specifically devised scheduled property "whether real or personal" to trustees, upon trust for his daughter for life, and after her decease for her children—sons at twenty-one, daughters at that age or marriage; he then devised and bequeathed his residuary real and personal estate, after deducting the scheduled property, to his said trustees to be held by them, as to a moiety thereof, upon the trusts thereinbefore declared of and concerning the specifically devised freeholds. The scheduled property, in fact, comprised freeholds only. The daughter died leaving two infant children:—*Held*, that the rule in *Genery* v. *Fitzgerald* (Jac. 468) applied under the special terms of this will both to the scheduled and residuary gifts, and that the infants

INFANT—*continued.*

were contingently entitled, on attaining twenty-one or marriage, to the income, since their mother's death, of the specifically devised freeholds, and of one moiety of the residuary estate; and, consequently, that sect. 43 of the Conveyancing and Law of Property Act, 1881, applied, and that the trustees had power to resort to the intermediate income for maintenance.—Conclusion of North, J., in *In re Jeffery* ([1891] 1 Ch. 675), as to the whole of the income in that case going to the child who first attained twenty-one "to the exclusion of the others," dissented from.—*Furneaux* v. *Rucker* (W. N. (1879) 135) explained. *In re* Burton's Will. Banks *v.* Heaven - - - **38**

3. —— *Marriage Settlement—Agreement to Settle after-acquired Property—Repudiation five Years after attaining Majority—Reasonable Time—Infants Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 2.] By a marriage settlement made in October, 1883, the father of the intended husband covenanted with the trustees to pay them £1500 a year during the lifetime of the wife, and such further period as there should be any issue living of the marriage, and the trustees were to pay the £1500 a year to the husband until he should assign or charge the same, and then to apply the same upon the trusts therein mentioned. The settlement also contained an agreement by the husband to vest in the trustees upon certain trusts all property to which he then was or should become entitled under any settlement executed by his father, or under the will of his father or mother, or by virtue of the intestacy of either of them. At the time of the marriage the husband was an infant; and the settlement was not confirmed by the Court on his behalf. He attained his majority in November, 1883.—The father died in May, 1887, and by his will appointed an interest to the husband under certain settlements which he had previously made, and gave the residue of his real and personal estate to his two sons, one of whom was the husband, in equal shares. The husband received the £1500 a year from the trustees during his father's lifetime, and after his death till July, 1888, when he repudiated the settlement.—In an action by the trustees claiming that the husband was bound by the marriage settlement and could not repudiate it, and in the alternative for compensation to the parties disappointed by the repudiation:—*Held*, reversing the decision of Romer, J., that the settlement, being for the benefit of the infant, was not void but voidable; that he was bound to repudiate the settlement, if at all, within a reasonable time after his coming of age; and that his repudiation came too late and was void.—In order to establish the invalidity of an infant's repudiation of a contract after he comes of age, it is not necessary to shew his knowledge of the facts and of his rights, as in a case of waiver, acquiescence, or election. Carter *v.* Silber. Carter *v.* Hasluck - - - - **C. A. 278**

INJUNCTION—Threats of action for infringement of patent - - - - **1**
See Patent. 1.

—— Trade secrets—Clerk - - - **518**
See Master and Servant.

INSURANCE, MARINE—*Marine Insurance Companies—Reinsurance—Contract to "pay as may be paid" on Original Policy—Non-payment of Original Assured by Reinsured—Liability of Reinsurers—Winding-up.*] Company A. having insured a ship, reinsured part of their risk with company B., and duly paid them the premium. The reinsurance policy issued by company B. contained the following clause: "Being a reinsurance applying to the lines of the A. Insurance Company, policy No. , subject to the same terms and conditions as the original policy, and to pay as may be paid thereon." The ship sustained damage by perils insured against, and the A. Company became liable upon their policy, but had, as yet, paid nothing thereon. Both companies having gone into liquidation, the liquidator of the A. Company claimed in the winding-up of the B. Company the amount secured by the policy of reinsurance:—*Held*, that payment by the A. Company on their original policy was not a condition precedent to their recovering against the B. Company on the policy of reinsurance. *In re* EDDYSTONE MARINE INSURANCE COMPANY. *Ex parte* WESTERN INSURANCE COMPANY - 423

INVENTION—Nature of—Provisional and complete specifications - - 66
See PATENT. 3.

IRELAND—Trade-mark—Rectification of register—Jurisdiction - - - 462
See TRADE-MARK. 4.

JUDGMENT—*Debtor's Reversionary Interest in Personalty—Creditor appointed Receiver—Equitable Execution—Declaration of Charge—Sale—Jurisdiction.*] The Court has no jurisdiction to make a declaration of charge upon a judgment debtor's reversionary personalty in favour of a judgment creditor who has got himself appointed receiver of such property. FLEGG *v.* PRENTIS [428

JURISDICTION—Trade-mark — Rectification of register—Owner domiciled in Ireland
See TRADE-MARK. 4. [462

LAND COMPANY—Paying dividends out of capital—Balance sheet - - 124
See COMPANY. 4.

LANDLORD AND TENANT—*Lease—Forfeiture—Relief against Re-entry or Forfeiture—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.] *Held* (affirming the decision of Kekewich, J.), that a lessee cannot apply under the Conveyancing and Law of Property Act, 1881, s. 14, for relief against re-entry or forfeiture after the lessor has actually re-entered. *—North London Land Company* v. *Jacques* (32 W. R. 283) distinguished. ROGERS *v.* RICE [C. A. 170

2. —— *Lease—Forfeiture—Breach of Covenant—Notice—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1.] A notice under sect. 14, sub-sect. 1, of the Conveyancing and Law of Property Act, 1881, requiring the lessee to remedy a breach of covenant, may be good, though it does not require payment of compensation in money. LOCK *v.* PEARCE - - - - - - 328

LANDLORD AND TENANT—*continued.*

3. —— *Lease—Waste—Agricultural Land—Farm—Covenant to cultivate "according to the best Rules of Husbandry"—Market Garden, Conversion into—Breach of Covenant—"Improvements"—"Ameliorating Waste"—Injury to Inheritance — Injunction — Agricultural Holdings (England) Act*, 1883, *ss.* 34, 54.] Under an agricultural lease, in 1889, of a farm near London, consisting of arable and pasture land, the lessee covenanted to yield up the premises at the end of the term, together with all fixtures and "improvements" which might during the term be fixed to or erected on the demised premises, except such fixtures as should be erected by the lessee, and which he should be at liberty to remove in case the lessor should object to purchase the same by valuation; and also that he would "in all respects cultivate and manage the farm, and every part thereof, in a good, proper, and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood." The lessee converted part of the demised premises into a market garden, erecting glasshouses thereon for the cultivation of hot-house produce for the London market. The lessor brought an action for an injunction to restrain the lessee from converting the farm into a market garden, alleging that his doing so was a breach of covenant and was waste, causing injury to the inheritance. At the trial it was proved that other farms in the neighbourhood had been converted into market gardens, that being found to be the most profitable mode of cultivation:—*Held*, that the conversion into a market garden did not constitute a breach of the covenant, and, inasmuch as injury had not been thereby caused to the inheritance, was not actionable "waste."—Action dismissed with costs.—To obtain an injunction against a defendant on the ground of "waste," the plaintiff must prove that what the defendant is doing is prejudicial to the inheritance; if it improves the value of the land it is not "waste."—"Ameliorating waste" discussed. —*Semble*, the Agricultural Holdings (England) Act, 1883, has abolished part of the old Common Law doctrine of "waste"; and buildings, such as hot-houses, erected by a lessee on his farm, and having the effect of rendering it more profitable, are "improvements" within the meaning of the Act. MEUX *v.* COBLEY - - - 253

LEASE—Agricultural—Improvements - 253
See LANDLORD AND TENANT. 3.

—— Best rent—Building lease - - 192
See SETTLED LAND ACT. 2.

—— Forfeiture, relief against - 170, 328
See LANDLORD AND TENANT. 1, 2.

—— Mining lease — Tenant for life—Settled Land Act - - - - 211
See SETTLED LAND ACT. 3.

LEGACY—Statute of Limitations - - 491
See LIMITATIONS, STATUTE OF.

LETTERS—Contract by - - - 27
See VENDOR AND PURCHASER. 1.

LIMITATIONS, STATUTE OF—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Action to recover Legacy—Express Trust—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 2.]

LIMITATIONS, STATUTE OF—*continued.*
A testatrix by her will bequeathed an annuity to J. for his life. She also bequeathed some pecuniary legacies, payable after the decease of the survivor of herself, her mother, and J., one of them being to the Plaintiff. And she devised and bequeathed all her real and personal estate to trustees, upon trust for sale and conversion, and out of the proceeds to pay her debts, and funeral and testamentary expenses, and the expenses of conversion, and to invest the residue, and out of the income, in the first place, to pay the annuity to J., and, in subordination to the aforesaid trust, to pay and apply during the life of the mother the residue of the income (not exceeding £800), at the discretion of the trustees, for the benefit of the mother, and after her death, if J. should survive her, the trustees were, out of the income, to pay the annuity given to him, so long as the same should continue payable, and, "subject to the several trusts, provisions, and directions hereinbefore contained, and to the payment of the several legacies hereby bequeathed," the testatrix directed that her trustees should stand possessed of the estate in trust for the Defendant absolutely.—The testatrix died in June, 1860. She had no real estate. In December, 1860, the mother died. J. died in January, 1866. Owing to the default of the solicitor of the executors and trustees of the will, who had placed in his hands a sum sufficient to pay the Plaintiff's legacy, the legacy was not paid to the Plaintiff. The Plaintiff, in 1891, issued an originating summons against the Defendant, who was the surviving trustee and executor and the residuary legatee of the testatrix, claiming administration of her estate:—*Held*, that no express trust was declared of the legacies, and that, consequently, the Plaintiff's right was barred by the Act, 37 & 38 Vict. c. 57, sect. 8. *In re* BARKER. BUXTON *v.* CAMPBELL - - - 491

LIQUIDATOR—Power to consider set-off - 457
See COMPANY. 7.

—— Provisional—Official receiver 204, 457
See COMPANY. 7, 8.

LONDON AGENT—Solicitor—"Client" - 413
See SOLICITOR. 1.

MAINTENANCE—Infant - - - 38
See INFANT. 2.

MANOR—Right of common—Ancient arable land—Customary freehold - - 374
See COMMON.

MARINE INSURANCE - - - 423
See INSURANCE, MARINE.

MASTER AND SERVANT—*Employer—Clerk—Trade Secrets—Communicating Information acquired during Service—Confidential Relation—Implied Contract—Injunction.*] The Defendant, upon completing a term of apprenticeship with the Plaintiffs, a firm of engine-makers, was retained in their employment as a paid clerk, but he ultimately left their service for that of another firm of engine-makers. Two days before leaving the Plaintiffs' service he compiled for his own purposes, and without their knowledge or consent, a table of dimensions of various types of engines made by them, and this table he had in his possession when he entered the service of his new employers, who subsequently exposed for sale an engine of, it was said, dimensions corresponding to dimensions given in the table, though this was denied:—*Held*, that, in compiling and retaining the table for his own purposes, the Defendant had committed an abuse of the confidence ordinarily existing between a clerk and his employer, or a breach of the implied contract apparently arising from that confidence, the confidence being that a servant shall not use, except for the purposes of service, the opportunities which that service gives him of gaining information; and accordingly that the Plaintiffs were entitled to an interim injunction restraining the Defendant from publishing or communicating the table or its contents to any person. MERRYWEATHER *v.* MOORE - - - - 518

METROPOLIS MANAGEMENT ACT—*Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—*Building Line—Open Spaces.*] An old house was pulled down in 1873, part of the site was thrown into the road; the rest was made part of a space intended to be used as garden to a new mansion. The mansion was pulled down in 1880. The whole property had become a building estate:—*Held*, that the site of the old house was open ground, so as to be subject to the provisions of sect. 75 of the Metropolis Management Amendment Act, 1862.—*Lord Auckland* v. *Westminster District Board of Works* (Law Rep. 7 Ch. 597) distinguished. WORLEY *v.* VESTRY OF ST. MARY ABBOTTS, KENSINGTON - - - 404

MINE—Adjacent to canal—Right of support
See SUPPORT. [432

MORTGAGE—*Practice—Sale by Mortgagor—Order for Sale—Reserved Price—Security for Costs—Conveyancing and Law of Property Act*, 1881, *s.* 25.] Under sect. 25 of the Conveyancing and Law of Property Act, 1881, the Court may make an order giving leave to a mortgagor to sell the mortgaged estate out of Court, even though the mortgagee has given the mortgagor notice to pay off, and the time limited by the notice has expired, provided it appears that the sale will probably be more successfully conducted by the mortgagor; but in making the order the Court will limit the time within which the mortgagor may sell, will require a reserved price to be fixed sufficient to cover what is due for principal, interest and costs, and will further require the mortgagor to deposit a certain sum in Court as security for costs.—*Woolley* v. *Colman* (21 Ch. D. 169), and *Davies* v. *Wright* (32 Ch. D. 220), considered. BREWER *v.* SQUARE - - 111

—— Share of patent—Co-owners - - 13
See PATENT. 2.

NAME AND ARMS CLAUSE—Estate pur autre vie - - - - - 87
See WILL. 2.

NEGLIGENCE—President of savings bank—Non-attendance at meetings—Liability 100
See SAVINGS BANK.

OFFICIAL RECEIVER—Winding-up of company —Provisional liquidator - 204, 457
See COMPANY. 7, 8.

PARCELS—Overhanging buildings - 53
See VENDOR AND PURCHASER. 2.

PARLIAMENT—Privilege of—Attachment 60
See DEBTORS ACT.

PATENT — *Action to restrain Threats—Circular —General Notice — Prosecution of Action—Due Diligence—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.] A. & Co., B. and H. were all three rival manufacturers of "blue," and B. had in 1884 taken out a patent for a particular method of wrapping up his blue. In August, 1890, H. began using similar wrappers, and in February, 1890, B. brought an action against him for having passed off his goods as those of B., in which action B., in November, 1890, recovered £500 damages. About that time A. & Co. began using wrappers something like B.'s. Between August and November, 1890, B. sent out in his boxes of blue the following circular signed by his solicitors: "Notice to grocers and others,—Information of extensive violation of Mr. B.'s patent rights has been received, all parties are warned not to infringe these rights." This circular was received by some of A. & Co.'s customers, though not by A. & Co. themselves. In December, 1890, B. brought an action against A. & Co. for fraudulently passing off their goods as his, and on the 31st of January, 1891, he amended his statement of claim by inserting a statement of his patent, and a claim for infringement. Meanwhile on the 16th of June, 1891, A. & Co. brought this action under sect. 32 of the Patents, Designs, and Trade Marks Act of 1883, to restrain B. from threatening their customers (amongst other things) by the circular. In June, 1891, B.'s patent was revoked by consent upon a petition presented by A. & Co., and B. discontinued that part of his action:—*Held*, by the Court of Appeal (affirming the judgment of Mathew, J.), that (1.) B. had not prosecuted his action with due diligence; (2.) that A. & Co. were "persons aggrieved" within the meaning of the 32nd section of the Act of 1883; (3.) that the circular was not a mere "general warning" within the principle of *Challender* v. *Royle* (36 Ch. D. 425), but was a threat within the 32nd section; and (4.) that A. & Co. were entitled to an inquiry as to damages.—*Per* Lindley, L.J.: Upon the true construction of sect. 32 it may apply to an intended infringement, provided it be shewn that the intended infringement, if carried out, would be an actual infringement. JOHNSON *v.* EDGE - **C. A. 1**

2. —— *Co-owners by Purchase—One Co-owner Mortgagee of other Co-owner's Share — Patent worked by Mortgagee Co-owner — Redemption — Profits received as Mortgagee.*] A co-owner of a patent is entitled to work it for himself, whether his part-ownership was acquired by a joint grant or by assignment from a prior part owner.—R., who was assignee of a moiety of a patent, and claimed to be owner of the other moiety by purchase from a mortgagee of S., the owner of that moiety, made machines according to the patent, and sold them at a profit, but did not grant licenses or receives royalties. S. brought his action to impeach the sale and to redeem. At the trial it was admitted that the sale of the second moiety to R. was bad, and that he could only be treated as transferee of the mortgage. By consent judgment was given, directing (1.) an account of what was due on the mortgage; (2.) an account of profits "come to the hands of R., as such mortgagee as aforesaid." R. filed an affidavit stating that he had worked the patent in the exercise of his rights as co-owner, and submitted that the profits he had made were not received by him as mortgagee, and that he was not liable to account for them:—*Held*, by Romer, J., and by the Court of Appeal, that as R. had not received royalties, and the profits which he had made were derived only from his using the patents, which as co-owner he was entitled to do, they were not profits received by him as mortgagee, and he was not liable to account for them, and that the form of the judgment did not preclude his taking the objection. STEERS *v.* ROGERS - - - **C. A. 13**

3. —— *Validity—Provisional Specification—Variance from Amended Complete Specification—Nature of Invention—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 5, *sub-s.* 3, 26.] A patentee must, in his provisional specification, describe the nature of his invention, though he need not go into detail. In his complete specification, when going into detail, he must describe the same invention; if not, his patent is void, although the variation is occasioned by the operation of a disclaimer amending the complete specification.—In 1878 the Plaintiff took out a patent for "Improvements in obtaining light by electricity, and in conveying, distributing, measuring, and regulating the electric current for the same, and in the means or apparatus employed therein."—In his provisional specification the Plaintiff described how he obtained the light and the incandescent lamp he proposed to use, the mode of conveying the light, a mode of distributing it by means of a conductor with branches and sub-branches, and a mode of measuring it, and then stated: "The electro-motive force of the electric conducting mains should be kept as nearly as possible constant at, say 100 volts." "A number of Planté's (lead and sulphuric acid) cells" (a well-known form of secondary batteries), "joined together in series between the main and the earth will serve as a kind of reservoir for the electricity." After describing the conductor to be used, the provisional specification proceeded: "In order to keep the electro-motive force in the electric mains constant, it is desirable to have in the first place several generating machines; next, it is necessary to have some regulator, such as those about to be described;" that is, a method of regulating the electro-motive force by means of a quadrant electrometer, no regulation by means of the batteries being mentioned.—In 1879 the Plaintiff filed his complete specification, wherein, after describing, in greater detail, his methods of obtaining light by electricity, and conveying, distributing, and measuring the electric current, and repeating in substance the statements in the provisional specification as to the keeping constant of the electro-motive force in the mains and the placing the batteries in series serving as a "kind

PATENT—*continued.*

of reservoir of electricity," and pointing out the use of the batteries for storage when little electricity was wanted for lighting purposes, he stated that "in order to keep the electro-motive force in the electric mains constant, it is desirable to have in the first place several generating machines, also a number of reservoir batteries as above explained; next, it is necessary to have some regulator such as that about to be described." The method of regulating with the aid of a quadrant electrometer was then re-described in detail, and the improvements he sought to attain were set forth.—In 1882 the Plaintiff disclaimed his claims in respect of measuring and conveying electricity; and in 1883 he further disclaimed his claims for distribution, whether alone or in conjunction with the incandescent lamps, and for regulating the electric current by means of the electrometer, the result being, that by his complete specification as amended by disclaimers, he then only claimed for improvements in distributing and regulating the electric current for obtaining light by electricity by means of the employment of secondary batteries as reservoirs of electricity in combination with a mode or system of distribution of electric energy:—*Held*, that the provisional specification and complete specification after the disclaimers did not describe the same invention; that the provisional specification, read most favourably for the Plaintiff, claimed for secondary batteries the invention of keeping the electro-motive force constant in the mains, and for the electrometer the invention of regulating that force; whereas the complete specification, after the amendments by way of disclaimer, was made to claim, for secondary batteries, not only the power of keeping the electro-motive force constant in the mains, but also of regulating it, which had theretofore in the provisional specification and original complete specification only been claimed for the electrometer. LANE FOX *v.* KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY - - - - 66

PRACTICE—*Affidavit—Filing after Motion disposed of—Entering as read.*] An affidavit used on a motion, but not filed until afterwards, may be entered in the order as read, even though the fact of its not having been filed has not been brought to the notice of the Court, provided it does not interfere with the date of the order, as where the filing is on the same day. *In re* KING & Co.'s TRADE-MARK - - C. A. 462

2. —— *Appeal for Costs—Costs on Judgment in Default of Defence—Rules of Supreme Court, 1883, Orders XXVII., r. 11; LXV., r. 1.*] When a Plaintiff moves for judgment in default of a defence, under Order XXVII., r. 11, the Judge, in deciding the issues between the parties, must look to the statement of claim, and nothing else; but he has the same discretion as to costs, under Order LXV., r. 1, in cases coming under Order XXVII., r. 11, as in all other cases; and the Court of Appeal will not review his discretion, even though there has been leave to appeal, unless there has been a disregard of principle or misapprehension of facts. YOUNG *v.* THOMAS C. A. 134

—— Sale by Court—Mortgaged estates - 111
See MORTGAGE.

PRACTICE—*continued.*

—— Trade-mark—Notice to expunge—Amendment—Jurisdiction — Owner domiciled abroad - - - - 462
See TRADE-MARK. 4.

PRESIDENT—Savings bank—Non-attendance at meetings—Liability—Negligence - 100
See SAVINGS BANK.

PRINCIPAL AND AGENT—Director—Representation by - - - - 452
See COMPANY. 3.

PRIVILEGE—Peer of Parliament—Attachment
See DEBTORS ACT. [60

PROBATE—Will in foreign language—Inaccurate translation admitted to probate - 229
See WILL. 3.

PROOF—Winding-up—Amendment of - 417
See COMPANY. 9.

RAILWAY COMPANY—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 32—*Power to take Temporary Possession of Land—Necessary Purpose*—"*Road*"—*Railroad.*] The authority given by sect. 32 of the Railways Clauses Consolidation Act, 1845, to take temporary possession of land for the purpose of forming roads does not include taking for the purpose of forming a railroad. Land can only be so taken when the taking is necessary, and mere saving of expense does not constitute necessity. MORRIS *v.* TOTTENHAM AND FOREST GATE RAILWAY COMPANY 47

RECEIVER — Debenture — Land in foreign country - - - - 303
See COMPANY. 1.

—— Debenture—Right of debenture holder to present winding-up petition - 362
See COMPANY. 2.

REDEMPTION—Mortgage of share of patent—Co-owners - - - - 13
See PATENT. 2.

REGISTRATION—Trade-mark 116, 245, 301,
See TRADE-MARK. 1—4. [462

RE-INSURANCE - - - - 423
See MARINE INSURANCE.

RELIGIOUS EDUCATION—Infant — Wishes of father - - - - 496
See INFANT. 1.

RENT-CHARGE—Redemption of—Improvements of settled estate - - - 233
See SETTLED LAND ACT. 5.

REPUDIATION—Infant—Reasonable time 278
See INFANT. 3.

RESTRAINT OF TRADE—*Covenant not to exercise any Business without consent of Employer—Consent not to be withheld except on engaging in a rival Business — Invalidity.*] The Defendant entered into an agreement with the Plaintiff, as his employer, that he would not accept another situation, or establish himself in any business, within fifteen miles of London, without the written consent of the Plaintiff, for a period of three years after leaving the Plaintiff's service; but such permission was not to be withheld if it could be proved to the satisfaction of the Plaintiff that the situation sought, or the business established, was not for the sale of the same class of

RESTRAINT OF TRADE—*continued.*
goods as those sold by the Plaintiff:—*Held* (affirming the decision of Kekewich, J.), on a motion for an injunction to restrain the Defendant from breaking the agreement, that the clause providing that the Plaintiff's permission was not to be withheld unless the business in which the Defendant engaged was in the same class of goods as the Plaintiff's, shewed that the restrictive clause was intended to apply to all kinds of business whatsoever, and was therefore wider than was necessary for the protection of the Plaintiff, and void. PERLS *v.* SAALFELD [C. A. 149

—— Articled clerk of solicitor—Client - 413
See SOLICITOR. 1.

REVERSION—Personalty — Judgment debtor—Equitable execution - -
See JUDGMENT.

ROAD—Power to take land for making - 47
See RAILWAY COMPANY.

RULES IN WINDING-UP, 1890, rr. 32, 67 204
See COMPANY. 8.

—— **rr. 110, 111, 112, 178** - - - 457
See COMPANY. 7.

RULES IN WINDING-UP, 1892, r. 3 - 457
See COMPANY. 7.

RULES OF SUPREME COURT, Order V., r. 9 (c.)
See TRADE-MARK. 4. [462

—— **Order XXVII., r. 11** — - - 134
See PRACTICE. 2.

—— **Order XXVIII., r. 12** - - - 245
See TRADE-MARK. 1.

—— **Order LXV., r. 1** - - - 134
See PRACTICE. 2.

RULES UNDER TRADE MARKS ACTS, rr. 31, 54, 55 - - - - - 245
See TRADE-MARK. 1.

SALE—By Court—Sale out of Court—Mortgaged estate - - - - 111
See MORTGAGE.

SAVINGS BANK — *Winding-up — President — Trustee and Manager—Non-compliance with Rules —Non-attendance at Meetings—Omission or Neglect — Liability—Trustee Savings Banks Act*, 1863 (26 & 27 *Vict. c.* 87), *ss.* 6, 11—*Trustee Savings Banks Act*, 1887 (50 & 51 *Vict. c.* 47)—*Companies Act*, 1862, *ss.* 165, 200.] The rules of a savings bank, formed in 1819, but reconstituted under the Trustee Savings Banks Act, 1863, provided that the business of the bank should be conducted by a president, trustees and managers, and that no transactions of deposit and repayment should take place without the presence of at least one trustee or manager in addition to the paid officer of the bank, and that lists of the depositors' balances should be extracted, checked and certified by the auditors, and kept open for the inspection of depositors. In the management of the bank these rules were not complied with, and their non-observance resulted in the perpetration of frauds upon the bank by its paid officer, in consequence of which the bank, in 1886, suspended payment. B., who had accepted the office of president, and was so described in all the books and documents issued by the bank, attended

SAVINGS BANK—*continued.*
a meeting of the trustees and managers in 1869 and signed the minutes, but took no further part at any time in the business of the bank. He was unaware of the irregularities which had occurred, and had received copies of reports and circulars issued by the bank, which, in the opinion of the Court, justified him in believing that its affairs were being conducted in conformity with the rules, and that the accounts were duly audited. In the winding-up of the bank, under sect. 3 of the Trustee Savings Banks Act, 1887, the liquidator sought to make B. liable, for neglect or omission in complying with the rules, to contribute to the assets by way of compensation:—*Held*, that omission to attend the meetings of the bank was not the same as neglect or omission of the duties which ought to have been performed at those meetings; and that under the circumstances B. was not liable. *In re* CARDIFF SAVINGS BANK. MARQUIS OF BUTE'S CASE 100

SECURED CREDITOR — Winding-up — Amendment of proof - - - 417
See COMPANY. 9.

SECURITY—Provisional liquidator - 204
See COMPANY. 8.

SECURITY FOR COSTS—Sale of mortgaged estate by Court - - - - 111
See MORTGAGE.

SEPARATE USE — Married Women's Property Act—Will made before Act - 291
See HUSBAND AND WIFE. 1.

SERVICE—Out of jurisdiction—Rectification of trade-mark—Irish jurisdiction - 462
See TRADE-MARK. 4.

SET-OFF—Winding-up — Jurisdiction of liquidator - - - - 457
See COMPANY. 7.

SETTLED LAND ACT—*Application of Capital Money—Expense of "Improvements" — Costs of Parliamentary Opposition—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 26, 36—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 15.] An estate was settled by the will of a testator, his widow being the first, and his nephew the second tenant for life. During the lifetime of the widow she expended out of her own moneys various sums in making improvements upon the estate. Some of these sums were expended before, and some after the commencement of the Settled Land Act, 1882. With regard to those which were expended after the commencement of the Act no scheme was, prior to the execution of the works, submitted for approval, either to the trustees of the settlement or to the Court, in accordance with sect. 26 of the Act. The widow also, prior to the commencement of the Act, paid out of her own moneys the costs of the successful opposition of the trustees to some bills in Parliament, which contained provisions injuriously affecting the estate. The repayment to the widow of all the sums thus expended by her was secured by four bonds given to her by the nephew. After the death of the widow, the nephew, being then tenant for life in possession of the estate, applied to the Court for a direction to the trustees to apply capital money in their hands in payment of the amounts due upon the bonds:—*Held*, that,

SETTLED LAND ACT—*continued.*

independently of sect. 36 of the Settled Land Act, 1882, the Court, under its general jurisdiction, had power to direct the payment of the costs of the Parliamentary opposition out of the capital money, and payment was directed accordingly: *Held*, that, as regarded the cost of improvements executed since the commencement of the Act of 1882, sect. 15 of the Settled Land Act, 1890, was retrospective in its operation, and enabled the Court to direct payment out of the capital money: —But *held*, that, as regarded the cost of improvements executed before the commencement of the Act of 1882, even if sect. 15 was retrospective (as to which *quære*), the Court had a discretion; and there was no reason why the tenant for life should be repaid out of capital sums which he had deliberately expended in improving the estate at a time when he knew that (as the law then stood) the capital was not applicable for such purposes. *In re* ORMROD'S SETTLED ESTATE 318

2. —— *Lease—"Best Rent"—Building Lease—Consideration—"Money laid out"—Part Voluntary Expenditure by Lessee—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 7 *sub-s.* 2, 8 *sub-s.* 1, 13 *sub-ss.* 1, 5, 53.] Past voluntary expenditure by a lessee on buildings comprised in his lease is not a "consideration" in law which will justify a tenant for life in granting a lease, under sect. 8, sub-sect. 1, of the Settled Land Act, 1882, at less than the "best rent" that can be reasonably obtained, as required by sect. 7, sub-sect. 2; neither can such expenditure be regarded as "money laid out," within sect. 7, sub-sect. 2, inasmuch as these words must be taken to refer to money laid out for the benefit of the settled land with direct reference to the grant of the lease. *In re* CHAWNER'S SETTLED ESTATES - 192

3. —— *Lease—Mining Lease—Contract—Tenant for Life impeachable for Waste—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 11, 12.] The owner of an estate contracted to lease coal to be worked by instroke from adjoining mines in the occupation of the intended lessees. The owner died before his coal was reached or the leases granted:—*Held*, that the tenant for life, under his will, though impeachable for waste, was entitled to the rents and royalties. Sect. 11 of the Settled Land Act, 1882, does not apply to a mining lease granted by a tenant for life for giving effect to a contract entered into by a predecessor who was absolute owner. *In re* KEMEYS-TYNTE. KEMEYS-TYNTE *v.* KEMEYS-TYNTE - - 211

4. —— *Settlement by Will—Trusts of Money declared by Deed for Purchase of Land to be settled on identical Limitations—Compound Settlement—Improvements—Application of Capital Money under Deed to Payment for Improvements on Estate settled by Will—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 21, 25, 26—*Settled Land Act*, 1890, *s.* 13.] Land was devised by will on limitations in strict settlement. The testator also by a deed declared that trustees, to whom he had transferred a money fund, should hold it on trust to lay it out in the purchase of land, which was to be settled on limitations identical with those of the will, except that two terms of years were interposed. The trusts of these two terms had become satisfied. The powers conferred by the two instruments were not precisely the same. The same persons were trustees of both the will and the deed. Upon the application of the tenant for life in possession under both instruments:—*Held*, that, although the limitations of the one instrument were not declared by reference to those of the other, but each set of limitations was stated independently, the principle of the decision in *In re Mundy's Settled Estates* ([1891] 1 Ch. 399) applied, and the will and the deed constituted one compound settlement, so that capital money arising under the deed could be applied in paying the cost of improvements executed upon land devised by the will. *In re* BYNG'S SETTLED ESTATES - - - - - 219

5. —— *Tenant for Life—Improvements, Money borrowed for—Security for Loan—Terminable Rent-charges—Purchase of by Trustee before* 1887 *—Redemption—Sale of improved part of Estate—Improvement of Land Act*, 1864 (27 & 28 *Vict. c.* 114), *s.* 60—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-ss.* 2, 3; *ss.* 25 *and* 26—*Settled Land Acts (Amendment) Act*, 1887 (50 & 51 *Vict. c.* 30), *ss.* 1, 2, 3.] The tenant for life of a settled estate, acting under the powers of the Improvement of Land Act, 1864, between the years 1881 and 1885 borrowed money for improvements on the estate upon the security of terminable rent-charges executed to the lenders by the Commissioners, in the form prescribed by the Act of 1864, which contains no proviso for redemption. The improvements were of the character authorized by the Settled Land Act, 1882. The trustee of the settlement bought up these rent-charges between 1883 and 1885, out of capital moneys in his hands for investment under the settlement. The portions of the settled estate on which the improvements had been effected were sold in 1888, and under the powers of the Settled Land Act, 1882, the terminable rent-charges were shifted on to other portions of the settled estate. The Settled Land Acts (Amendment) Act, 1887, provides, in effect (inter alia) that, where any improvements, of a kind authorized by the Settled Land Act, 1882, have been or may be made either before or after the passing of the Act, and rent-charges have been or may be created under any Act to pay off loans for such improvements, any capital moneys expended in redeeming, or providing for the payment of, such rent-charges shall be deemed to be applied in payment for improvements authorized by the Act of 1882:—*Held* (1.) That the buying up of the rent-charges by the trustee was an investment of capital money under sect. 60 of the Act of 1864, and not an expenditure of capital money in redeeming or otherwise providing for the payment thereof within sect. 1 of the Act of 1887. (2.) That the Act of 1887 was not retrospective, so as to entitle the tenant for life to be recouped out of capital moneys the instalments of the rent-charges paid before the Act came into operation. (3.) But that, as regards instalments falling due after the passing of that Act and after the question had been raised by the tenant for life, he was entitled to have provision made for them out of capital moneys subject to the trusts of the settlements, notwith-

SETTLED LAND ACT—*continued.*
standing that the improved portions of the settled estate had been sold; and *held*, accordingly, that such provision must be made in the present case as regards the instalments accrued and to accrue after the 25th of March, 1889, when the question first arose. *In re* HOWARD'S SETTLED ESTATES [233

SETTLEMENT — *Deed — Construction—Rule in Shelley's Case.*] By a deed of conveyance lands were limited to the use of E. and his assigns during his life without impeachment of waste, with an ultimate limitation to the use "of such person or persons as at the decease of the said E. shall be his heir or heirs at law, and of the heirs and assigns of such person or persons":—*Held* (reversing the decision of Kekewich, J.), that the rule in *Shelley's Case* (1 Rep. 93 b) did not apply, and that E. took, not an estate in fee simple, but merely a life estate, with a contingent remainder in fee to the person or persons who at his death answered the description of his heir or co-heirs at law. EVANS *v.* EVANS - - - C. A. 173

—— Compound settlement—Settled Land Act—Improvements - - - 219
See SETTLED LAND ACT. 4.

—— Infant—Covenant to settle after-acquired property—Repudiation - - 278
See INFANT. 3.

SHARES—Implied contract for—Director's qualification - - - - 158
See COMPANY. 6.

SHELLEY'S CASE—Rule in - - 173
See SETTLEMENT.

SOLICITOR — *Articles — Construction — Client — London Agent.*] Country solicitors held to be "clients" of their London agent within the meaning of a covenant by an articled clerk not to transact business with persons who should be clients of his master's firm during the period of the articles. REID *v.* BURROWS - - 413

2. —— *Bill of Costs—Taxation after Payment —Non-delivery of Bill—Retention of Costs by Solicitor out of Client's Moneys—Settled Accounts—Subsequent delivery of Bill—Attorneys and Solicitors Act* (6 & 7 *Vict. c.* 73), *s.* 41.] A firm of solicitors kept a running account with a client in which they credited him with moneys received, and debited him with disbursements. They also, from time to time, debited him with sums in respect of costs for professional business transacted by them as his solicitors. No bills of costs were delivered by the solicitors, but their accounts were periodically balanced and signed by the client, as "settled and approved," but no bills of costs were delivered. The last account so signed by the client was dated the 19th of May, 1886. In 1890, he brought an action for an account and for delivery of a bill of costs. After the issue of the writ, the solicitors delivered a bill of costs. There was no evidence of fraud or pressure on the part of the solicitors, and the bill delivered contained no items of gross overcharge.—At the trial, the Plaintiff abandoned his claim for an account, but insisted upon his right to have the bill of costs taxed:—*Held*, that the payments which had been made in account, were referable to the bill subsequently delivered, and that there were no special circumstances entitling the client to an order for taxation.—*In re Stogdon* (56 L. J. (Ch.) 420) considered and explained. HITCHCOCK *v.* STRETTON 343

SOLICITOR—*continued.*

3. —— *Lien—Costs — Property recovered or preserved—23 & 24 Vict. c.* 127, *s.* 28—*Priority of Lien as between successive Solicitors.*] The principle of *Cormack* v. *Beisly* (3 De G. & J. 157) and *In re Wadsworth* (34 Ch. D. 155), that the solicitor last employed in an action is entitled to a charge for costs under 23 & 24 Vict. c. 127, s. 28, in priority to his predecessor, is unaffected by *North* v. *Stewart* (15 App. Cas. 452).—*Semble*, where a receiver of rents has been appointed in an action and a new receiver is afterwards appointed in his place, the solicitor by whom such last-mentioned appointment was obtained is entitled to priority of lien against any rents subsequently received.—In an action for general administration of the real and personal estate of a testator who died intestate as to certain real estate, a person who claimed to be the heir-at-law obtained leave to attend. The Chief Clerk, by his certificate, found that another person was the heir-at-law; but the Judge found in favour of the claimant, and his decision was affirmed on appeal. In the course of the action the claimant changed his solicitors several times, the three solicitors last employed being A., B., and C., successively. Of these A. was employed during the most active and costly period of the litigation, B. was employed previously to the certificate of the Chief Clerk, and thenceforth until shortly after notice of the appeal was given, and C. was employed for the purpose of the appeal only. A. and B. obtained charging orders under 23 & 24 Vict. c. 127, s. 28; but such orders reserved the prior rights, if any, of C. There was a fund in Court representing rents of the real estate descended, but such fund was insufficient for payment of the costs owing to A., B., and C.:—*Held*, applying the principle above referred to, that C. was entitled to be paid his costs out of the fund in Court, in priority to B. and A., and B. in priority to A. *In re* KNIGHT. KNIGHT *v.* GARDNER - - - - 368

SPECIFICATION—Provisional — Variance from complete - - - - 66
See PATENT. 3.

STATUTES.
3 & 4 Will. 4, c. 105, s. 12—*Dower* - - 295
See WILL. 1.
6 & 7 Vict. c. 73, s. 41—*Solicitors* - 343
See SOLICITOR. 2.
8 & 9 Vict. c. 20, s. 32—*Railway Clauses Act*
See RAILWAY COMPANY. [47
23 & 24 Vict. c. 127, s. 28—*Solicitors* - 368
See SOLICITOR. 3.
25 & 26 Vict. c. 89, ss. 165, 200—*Companies*
See SAVINGS BANK. [100
25 & 26 Vict. c. 102, s. 75—*Metropolis Management Act* - - - - 404
See METROPOLIS MANAGEMENT ACT.
26 & 27 Vict. c. 87, ss. 6, 11—*Savings Banks*
See SAVINGS BANK. [100
27 & 28 Vict. c. 114, s. 60—*Improvement of Land* - - - - 233
See SETTLED LAND ACT. 5.

STATUTES—*continued.*

36 & 37 Vict. c. 66, s. 25, sub-s. 2—*Judicature Act* - - - - - 491
See LIMITATIONS, STATUTE OF.

37 & 38 Vict. c. 57, s. 8—*Real Property Limitation* - - - - 491
See LIMITATIONS, STATUTE OF.

37 & 38 Vict. c. 62, s. 2—*Infants* - 278
See INFANT. 3.

38 & 39 Vict. c. 91, s. 10—*Trade Marks* 116
See TRADE-MARK.

41 & 42 Vict. c. 31, s. 4—*Bills of Sale* - 352
See BILL OF SALE.

41 & 42 Vict. c. 54— *Debtors* - - 60
See DEBTORS ACT.

44 & 45 Vict. c. 41, s. 14—*Conveyancing Act*
See LANDLORD AND TENANT. 1. [170

—— —— s. 14, sub-s. 1 - - - 328
See LANDLORD AND TENANT. 2.

—— —— s. 25 - - - - 111
See MORTGAGE.

—— —— s. 43 - - - - 38
See INFANT. 2.

45 & 46 Vict. c. 38, ss. 2, 21, 25, 26—*Settled Land Act* - - - - 219
See SETTLED LAND ACT. 4.

—— —— ss. 6, 7, 8, 13, 53 - - 192
See SETTLED LAND ACT. 2.

—— —— ss. 11, 12 - - - 211
See SETTLED LAND ACT. 3.

—— —— ss. 21, 25, 26 - - - 233
See SETTLED LAND ACT. 5.

—— —— ss. 26, 36 - - - 318
See SETTLED LAND ACT. 1.

45 & 46 Vict. c. 43, s. 1—*Bills of Sale* - 352
See BILL OF SALE.

45 & 46 Vict. c. 75, ss. 1, 5—*Married Women's Property Act* - - 291, 336
See HUSBAND AND WIFE. 1, 2.

46 & 47 Vict. c. 52, ss. 44, 58, 118—*Bankruptcy*
See BANKRUPTCY. [138

46 & 47 Vict. c. 57, ss. 5, sub-s. 3, 26—*Patents, Designs, and Trade Marks* - 66
See PATENT. 3.

—— —— ss. 10, 16 - - - 301
See TRADE-MARK. 2.

—— —— s. 32 - - - - 1
See PATENT. 1.

—— —— ss. 62, sub-s. 6, 90, 107—111, 117
See TRADE-MARK. 4. [462

—— —— s. 64, sub-s. 2 - - - 116
See TRADE-MARK. 3.

—— —— s. 69 - - - - 245
See TRADE-MARK. 1.

46 & 47 Vict. c. 61, ss. 34, 54—*Agricultural Holdings* - - - - 253
See LANDLORD AND TENANT. 3.

49 & 50 Vict. c. 27, ss. 2, 3, 6, 13—*Infants* 496
See INFANT. 1.

50 & 51 Vict. c. 30, ss. 1, 2, 3—*Settled Land Act* - - - - - 233
See SETTLED LAND ACT. 5.

50 & 51 Vict. c. 47—*Savings Banks* - 100
See SAVINGS BANK.

STATUTES—*continued.*

51 & 52 Vict. c. 20, ss. 10, 16—*Patents, Designs, and Trade Marks* - - - 301
See TRADE-MARK. 2.

53 & 54 Vict. c. 63, ss. 4, 31, 32—*Companies (Winding-up)* - - - 204
See COMPANY. 8.

—— —— s. 6, sub-s. 2, Sched. I., r. 8 - 417
See COMPANY. 9.

53 & 54 Vict. c. 69, s. 13—*Settled Land Act* 219
See SETTLED LAND ACT. 4.

—— —— s. 15 - - - - 318
See SETTLED LAND ACT. 1.

SUPPORT—*Canal—Right of Navigation—Subjacent Mines—Easement—Right of Support.*] By a private Act of George II., the undertakers were authorized to convert an existing brook into a "navigable" stream, and to maintain such "navigation," and to make such new cuts and canals as might be requisite for that purpose, paying compensation by an annual rent or a payment in gross to any landowner for user of or damage to his land in carrying on or maintaining "the said navigation"; also to charge tolls for the user by the public of "the said brook, cuts, or canals." There was no express power given to the undertakers to purchase lands, but persons under disability were authorized to sell lands required for "the said intended navigation." The Act contained no reference to mines or minerals, nor any express provision for their purchase.—The brook was duly converted into a canal, but no conveyances of surface lands were ever executed to the undertakers, who, under the Act, made annual payments to landowners for the user of their lands for the canal.—Ultimately, by a private Act of 1864, the canal became vested in the Plaintiffs, the Act providing that the canal should be subject to the provisions of any existing or future general Act relating to canals.—The Defendants, who were the owners of coal under the canal, having, in working their coal, caused a subsidence of part of the canal, the Plaintiffs brought an action for an injunction, on the ground that they had a right of support for their canal:—*Held*, that the Act of George II. was to be read as equivalent to a grant by the owners of land over which the canal passed of a mere right to make and maintain the canal as a waterway, and not to a grant of the surface land; and that a grant of such a right did not carry with it, as a necessary incident, a right of support so as to prevent the landowners from working their subjacent mines.—*Benfieldside Local Board* v. *Consett Iron Company* (3 Ex. D. 54) considered. LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* EVANS - - - - - - 432

TENANT BY THE CURTESY — Married Women's Property Act - - 336
See HUSBAND AND WIFE. 2.

TENANT FOR LIFE — Improvements — Settled Land Act - - - - 233
See SETTLED LAND ACT. 5.

—— Mining lease—Right to royalties and rent
See SETTLED LAND ACT. 3. [211

—— Rule in *Shelley's Case* - - - 173
See SETTLEMENT.

TENANT PUR AUTRE VIE—Special occupant
See WILL. 2. [87

THREATS—Action to restrain—Infringement of patent - - - - - - 1
See PATENT. 1.

TRADE-MARK—*Application for Registration—Notice of Opposition—Appeal referred to Court—Amendment of Notice of Opposition—Jurisdiction—Patents, Designs, and Trade Marks Acts*, 1883–8, *s.* 69—*Trade Marks Rules*, 1890, *rr.* 31, 54, 55—*Rules of Supreme Court*, 1883, *Order* XXVIII., *r.* 12.] Where an opposed application for the registration of a trade-mark has been allowed by the Comptroller, and an appeal by the opponent against the decision has been referred by the Board of Trade to the Court, the function of the Court is limited by sect. 69, sub-sect. 4, of the Patents, Designs, and Trade Marks Acts, 1883–8, to hearing and determining the appeal, and the Court has no jurisdiction to allow an amendment of the opponent's notice of opposition. *In re* ROBERTSON, SANDERSON & CO.'S APPLICATION [245

2. —— *Letters—Disclaimer—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64 *sub-s.* 2, *s.* 74 *sub-s.* 2, *s.* 77—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *ss.* 10, 16.] A corset manufacturer registered a trade-mark with initial letters added, disclaiming the right to the exclusive use of the added matter. He used those letters by themselves on a particular part of his corsets. A motion on his part to restrain a rival manufacturer from using the same initials on the same part of his corsets, as being calculated to deceive, was refused on the ground that the Plaintiff had disclaimed the right to the exclusive use of the initial letters. ROSENTHAL *v.* REYNOLDS - 301

3. —— *Registration—"Special and Distinctive Words"—Name of Individual or Firm—Trade Marks Registration Act*, 1875, *s.* 10—*Patents, Designs, and Trade Marks Acts*, 1883–8, *s.* 64.] Where the name of an individual or firm printed in ordinary or ornamental type has been used as a trade-mark for goods before the 13th of August, 1875, indicating the goods as having been sold or manufactured by that particular individual or firm, it may properly be registered as a "special and distinctive word or combination of letters used as a trade-mark before the 13th of August, 1875," within sect. 10 of the Trade Marks Registration Act, 1875, or sect. 64, sub-sect. (ii.), of the Patents, Designs, and Trade Marks Act, 1883. *In re* J. & J. HOPKINSON'S TRADE-MARKS - 116

4. —— *Rectifying Register—Motion to expunge—Registered Proprietor domiciled out of Jurisdiction—Service—Irish Jurisdiction—Patents, Designs, and Trade Marks Act*, 1883, *ss.* 62, *sub-s.* 6, 90, 107–111, 117—*Practice—Notice of Motion—Amendment—New Notice of Motion—"Commencement" of Matter—Marking with Judge in Rotation—Affidavits—Irregularity—Filing after Motion disposed of—Entering in order as read—Rules of Supreme Court*, 1883, *Order* v., *r.* 9 (*c*).] The High Court of Justice in England has jurisdiction, under the Patents, Designs, and Trade Marks Acts, 1883 and 1888, to rectify the register of trade-marks kept under those Acts, notwithstanding that the registered proprietor of the

TRADE-MARK—*continued.*
mark affected is domiciled in Scotland or Ireland. Whether the Scotch or Irish Courts have a concurrent jurisdiction with the English Courts to rectify the register, *quære.*—No special procedure is prescribed by the Acts or rules as to the service on parties interested of notice of application to expunge a trade-mark. Therefore it is sufficient if such notice is given as is required by natural justice.—Where the registered proprietor of a trade-mark registered in England under the Patents, Designs, and Trade Marks Act, 1883, was a British subject domiciled in Ireland, out of the jurisdiction of the English Courts and therefore could not be served with a notice of motion to expunge the trade-mark, it was *held* sufficient to send him a copy of the notice of motion with a letter informing him that proceedings had been commenced which might affect his interests; and the Court heard the motion and made an order, although the registered proprietor did not appear. The decision of Kekewich, J., affirmed.—*Per* Kekewich, J.: Where proceedings for expunging a trade-mark have been commenced by notice of motion, the subsequent alteration or amendment of the notice in a mere matter of detail not affecting the nature of the relief claimed, such as by striking out the name of a respondent improperly added, or by changing the date for the hearing of the motion, does not make it a new notice of motion requiring to be taken to the Writ Department of the Central Office to be re-marked with the name of the Judge in rotation, under Rules of Supreme Court, 1883, Order v., r. 9 (*c*), or requiring the leave of the Court to use at the hearing affidavits filed prior to the alteration or amendment.—An affidavit used on a motion, but not filed until afterwards, may be entered in the order as read, even though the fact of its not having been filed has not been brought to the notice of the Court, provided it does not interfere with the date of the order, as where the filing is on the same day. *In re* KING & CO.'S TRADE-MARK - - - - - C. A. 462

TRADE SECRETS—Communication of by clerk
See MASTER AND SERVANT. 518

TRUST—Statute of Limitations—Express trust
See LIMITATIONS, STATUTE OF. 491

TRUSTEE—*Constructive Trust—Trustee de son Tort—Control of Trust Money—Trustee or Agent—Persons assisting Executrix in carrying on Testator's Business in Breach of Trust.*] In general cestuis que trust may proceed against an agent of their trustee where he has not confined himself to the duties of an agent, but by accepting a delegation of the trust, or by fraudulently mixing himself up with a breach of trust has himself become a trustee by construction of law, i.e., a trustee de son tort. But it is essential to the character of a trustee that he should have trust property either actually vested in him, or so far under his control that he is in a position to require that it should be vested in him. A man ought not to be held responsible as a trustee for money under his control unless he can, if he will, put the money into his own pocket, or pay it away as he pleases to some one else.—A testator left his property on trust for his wife and children, but gave no directions as to the carrying on of his business. The

TRUSTEE—*continued.*

widow and executrix, by the advice of her husband's friends, decided to carry on the business. Two of the friends who were aware that the carrying on of the business would be a breach of trust, agreed to assist her. A banking account was opened in her name, and the bankers were instructed by her not to honour her cheques unless they bore certain initials, which were in fact the initials of the two friends. The estate of the testator was applied in carrying on the business, and the two friends assisted her and initialed the cheques signed by her. There was no suggestion of any fraudulent or unfair dealing on the part of either of them. The business ultimately was carried on at a loss, and an action was brought by some of the children seeking to make the two friends responsible as trustees de son tort:—*Held*, that the fact that the executrix could not draw any money without their concurrence did not give them such a control over the moneys from time to time drawn out as was necessary in order to establish a case against them as trustees de son tort.—While the business was being carried on they from time to time personally supplied goods to the executrix in the ordinary course of business, and were respectively paid by cheques drawn as above mentioned:—*Held*, that they were not trustees for the Plaintiffs of the moneys so received by them respectively.—One of them became trustee of a deed of arrangement under which all the property and effects used in the business were sold and the proceeds distributed among the creditors, of whom he was one:—*Held*, that he did not thereby incur any liability to the Plaintiffs as a constructive trustee. *In re* BARNEY. BARNEY *v.* BARNEY - - - - - 265

—— Attachment—Debtors Act - - 60
See DEBTORS ACT.

TRUSTEE IN BANKRUPTCY — After-acquired property of bankrupt - - 138
See BANKRUPTCY.

VENDOR AND PURCHASER—*Contract by Letters—Acceptance of Offer by Post—Time of Acceptance—Withdrawal of Offer.*] H., who lived at Birkenhead, called at the office of a land society in Liverpool, to negotiate for the purchase of some houses belonging to them. The secretary signed and handed to him a note giving him the option of purchase for fourteen days at £750. On the next day the secretary posted to H. a withdrawal of the offer. This withdrawal was posted between 12 and 1 o'clock, and did not reach Birkenhead till after 5 P.M. In the meantime H. had, at 3.50 P.M., posted to the secretary an unconditional acceptance of the offer, which was delivered in Liverpool after the society's office had closed, and was opened by the secretary on the following morning:—*Held*, that where the circumstances under which an offer is made are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of it, the acceptance is complete as soon as it is posted.—*Held*, that in the present case, as the parties lived in different towns, an acceptance by post must have been within their contemplation, although the offer was not made by post.—*Held*, that a revocation of an offer is of no effect until brought to the mind of the person to whom the offer was made, and that therefore a revocation sent by post does not operate from the time of posting it.—*Held*, therefore (reversing the decision of the Vice-Chancellor of the County Palatine), that a binding contract was made on the posting of H.'s acceptance, that the revocation of the offer was too late, and that H. was entitled to specific performance. HENTHORN *v.* FRASER C. A. 27

2. —— *Parcels—Overhanging Building.*] A portion of premises as occupied overhung adjoining premises. The owner in fee of both premises demised them as occupied to separate persons. He subsequently conveyed the overhung premises by reference to a ground-floor plan, subject to the lease of those premises, but not expressly subject to the lease of the overhanging premises:—*Held*, that the overhanging part of the adjoining premises passed by the conveyance.—The ownership of a building partly overhanging other premises does not give the owner a right to raise the overhanging part of his building LAYBOURN *v.* GRIDLEY - - - 53

—— Doubtful title—Undischarged bankrupt
See PRACTICE. 2. [138

WASTE—Agricultural Holdings Act—Improvements - - - - 253
See LANDLORD AND TENANT. 3.

WILL — *Annuity to Widow — Legacies — Real Estate—Annuity in satisfaction of Dower—Insufficiency of Personal Estate—Priority—Dower Act*, 1833 (3 & 4 *Will.* 4, *c.* 105), *s.* 12.] Where a testator by his will disposes of all his real estate, out of which, if he died intestate, his widow would be entitled to dower, and gives a legacy to his wife which he declares to be in satisfaction of her dower, and also other legacies, and dies seised of real estate, his widow is not entitled to priority over the other legatees in the event of the personal estate being insufficient to pay all the legacies in full.—The dictum of Malins, V.C., in *Roper* v. *Roper* (3 Ch. D. 714, 719) disapproved of and not followed. *In re* GREENWOOD. GREENWOOD *v.* GREENWOOD - 295

2. —— *Limitations in Strict Settlement — Name and Arms Clause—Cesser of Life Estate—Estate pur autre vie—Special Occupant.*] Under a will, an estate and certain funds and securities stood limited to the use of A. for life, with remainder to the use of his second and other subsequent sons successively in tail male, with remainder to his first son in tail male. By a name and arms clause in the will, upon failure by any tenant for life to comply with the clause, his estate was to go over to, or in trust for, the person next beneficially entitled, as if such tenant for life were dead; and the trustees to preserve the contingent remainders were to pay the rents to the persons to whom they would be applicable if such tenant for life were dead, and so that his issue entitled in remainder might be entitled to the rents during his life.—A. failed to comply with the clause, and the estate went over to his

WILL—*continued.*

only son B., who had previously executed a disentailing deed.—B. died during A.'s lifetime, intestate and without issue, and leaving a widow.—A. (who was eighty-five years of age) was the heir-at-law, sole next of kin, and legal personal representative of B.—At the time of B.'s death, he was, in the events which had happened, beneficially entitled to an equitable estate pur autre vie during A.'s life, determinable on the birth of a second son to A., and also to an estate in fee simple in remainder expectant upon A.'s death without having a second son:—*Held*, first, that A. took the rents of the real estate as special occupant, and the income of the funds and securities as legal personal representative of B., and consequently, that during A.'s life, and as long as he had no second son, the income of the funds and securities formed part of B.'s personal estate, while the rents of the real estate did not:—*Held*, secondly, that the widow of B. was not entitled to dower. *In re* MICHELL. MOORE *v.* MOORE 87

3. —— *Will in Foreign Language—English Translation admitted to Probate—Translation alleged to be inaccurate—Right of Court to look at Original Will.*] An Englishman, who had resided in France, died there, having made a will in the French language, which was registered in France and was retained there. Probate of an English translation was afterwards granted by the Probate Division of the High Court to the executor appointed by the will. The translation was certified by an English notary public to be a true and faithful translation of a copy (in French) of the original will, which was certified by a notary public in France to be a correct copy. The English translation and the certified French copy were both annexed to the certificate of the English notary, and were both deposited in the Probate Registry. A question upon the construction of the will being raised in the Chancery Division, and it being alleged that the English

WILL—*continued.*

translation was inaccurate:—*Held*, that, none of the parties insisting upon an application being made to the Probate Division to correct the English translation, the Court was entitled to look at the original French as well as at the English translation:—But *held*, that the Court could not construe the will without the assistance of French lawyers, nor until the testator's domicil had been ascertained.—The report of *L'Fit* v. *L'Batt* (1 P. Wms. 526) corrected. *In re* CLIFF'S TRUSTS - - - - - - - 229

—— Maintenance of infant—Contingent interest
See INFANT. 2. [38

—— Married woman—Prior to Married Women's Property Act - - - 291
See HUSBAND AND WIFE. 1.

WINDING-UP - - 158, 204, 417, 457
See COMPANY. 6—9.

—— Petition for—Right to present—Debenture-holder - - - - 362
See COMPANY. 2.

—— Savings bank - - - - 100
See SAVINGS BANK.

WITHDRAWAL—Offer of sale—Acceptance by post - - - - - 27
See VENDOR AND PURCHASER. 1.

WORDS—"Best rent" - - - 192
See SETTLED LAND ACT. 2.

—— "Client" - - - - 413
See SOLICITOR. 1.

—— "Distinctive words" - - - 116
See TRADE-MARK. 3.

—— "Money laid out" - - - 192
See SETTLED LAND ACT. 2.

—— "Person aggrieved" - - - 1
See PATENT. 1.

—— "Road" - - - - - 47
See RAILWAY COMPANY.

BIBL. LONDIN. UNIV.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

UL - 7 JAN 1976